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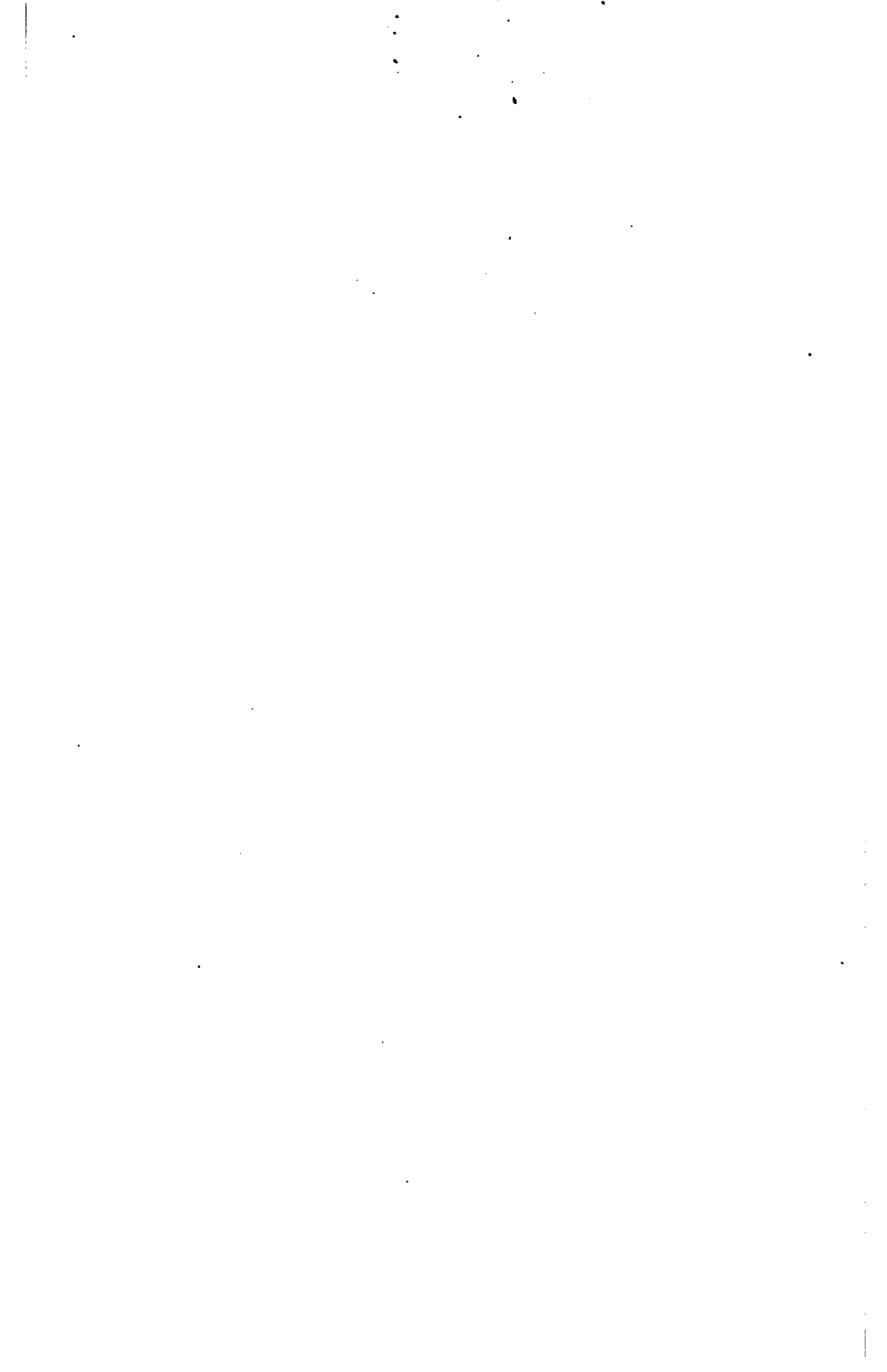
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Preface.

This volume is a reprint of the cases decided by the state courts of Ohio, found in the ten volumes of *Western Law Journal*, published at Cincinnati, 1848 to 1853. The number of volumes are reduced from ten to one, as all editorial, correspondence, cases decided in other states, and out-of-date matter have been omitted.

As the original volumes have been out of print for a long time, and copies are scarcely obtainable at any price, it has been thought that a republication of these cases was called for. Without it, the libraries of Ohio lawyers, must continue to be incomplete, in not having all the Ohio case law.

As citations to these authorities are found in the different editions of the *Bates' Ohio Digest*, and come constantly under the eye of every judge and attorney who is looking up Ohio judicial precedents, it is believed the bar will consider our adventure a desirable one, and patronize it accordingly.

The cases are a faithful transcript of the originals, nothing having been added, except the bold face title lines over the beginning of the cases, and in many instances these are found over the original cases. Where none existed we have supplied them. No case of an Ohio state court has been omitted, or abridged in the least, and no comment of importance has been left out. The work has been carefully proof read and the decisions may be relied upon as being as authentic as the originals.

The volumes are placed following each other in the same manner, and the cases appear in the same order as printed in the *Western Law Journals*, except in two or three instances, a short decision relating to a former one, and being merely explanatory, is made to follow the decision to which it relates.

The original paging is maintained, the volume number being at the head of the page, and the page number inserted in the margin in bold type. By observing these bold face figures any desired citation can be as readily located as in the original volume.

A table of parallel paging is also given, by reference to which the page of this book can also be placed, from any citation to the original volume and page.

A table of cases is also given to facilitate reference.

THE LANING PRINTING CO.

Table of Parallel Paging.

Vol. I.		Vol. II.		In Law Journal		In this Book.	
In Law Journal.		In this Book.		Page		Page	
Page 23		Page 1	Page 45	Page 81	Page 415	Page 192	
" 28	" 5	" 66	" 82	" 448	" 471	" 195	
" 49	" 8	" 68	" 84	" 563	" 178	" 197	
" 53	" 10	" 69	" 84	Vol. IV.			
" 54	" 11	" 70	" 85	Page 1	Page 198		
" 104	" 12	" 78	" 87	" 4	" 200		
" 107	" 15	" 81	" 89	" 70	" 202		
" 118	" 17	" 123	" 96	" 123	" 207		
" 160	" 18	" 125	" 97	" 128	" 211		
" 163	" 20	" 183	" 98	" 166	" 214		
" 168	" 22	" 213	" 99	" 279	" 215		
" 187	" 24	" 248	" 102	" 281	" 216		
" 216	" 26	" 279	" 105	" 500	" 218		
" 220	" 29	" 325	" 119	" 538	" 219		
" 222	" 31	" 369	" 126	" 540	" 221		
" 256	" 32	" 375	" 127	" 544	" 223		
" 260	" 36	" 401	" 128	" 545	" 225		
" 271	" 37	" 402	" 130	" 555	" 226		
" 273	" 38	" 405	" 132	Vol. V.			
" 305	" 41	" 406	" 133	Page 8	Page 228		
" 310	" 46	" 426	" 135	" 20	" 230		
" 319	" 47	" 445	" 136	" 212	" 233		
" 321	" 49	" 499	" 139	" 356	" 235		
" 333	" 50	" 501	" 141	" 361	" 238		
" 358	" 51	" 503	" 143	" 405	" 245		
" 360	" 52	" 559	" 150	" 406	" 246		
" 393	" 54	" 570	" 153	" 413	" 247		
" 394	" 55	Vol. III.		" 459	" 248		
" 395	" 56	Page 7	Page 155	" 463	" 251		
" 396	" 57	" 65	" 160	" 465	" 252		
" 398	" 58	" 79	" 166	" 467	" 254		
" 404	" 59	" 81	" 167	" 503	" 257		
" 410	" 61	" 129	" 168	" 508	" 261		
" 412	" 63	" 130	" 168	" 511	" 262		
" 415	" 64	" 131	" 169	Vol. VI.			
" 417	" 65	" 134	" 171	Page 179	Page 263		
" 418	" 66	" 174	" 173	" 315	" 265		
" 452	" 67	" 220	" 177	" 318	" 267		
" 454	" 69	" 222	" 179	" 350	" 269		
" 487	" 73	" 263	" 180	" 490	" 276		
" 488	" 74	" 305	" 181	" 538	" 278		
" 515	" 75	" 360	" 183	" 543	" 277		
" 550	" 76	" 364	" 186	" 566	" 279		
" 553	" 79	" 380	" 191				
" 563	" 80						

TABLE OF PARALLEL PAGING.

7

Vol. VII.

In Law Journal.	In this Book.	In Law Journal.	In this Book.
Page 37	Page 280	Page 385	Page 141
" 39	" 282	" 389	" 142
" 67	" 283	" 390	" 145
" 90	" 284	" 392	" 155
" 121	" 284	" 393	" 158
" 144	" 307	" 403	" 159
" 149	" 308	" 404	" 160
" 218	" 312		" 162
" 221	" 315	Page 405	" 163
" 244	" 315	" 405	" 169
" 235	" 316	" 407	" 171
" 251	" 316	" 413	" 193
" 265	" 326	" 414	" 207
" 369	" 335	" 416	" 213
" 392	" 343	" 426	" 215
" 407	" 344	" 428	" 219
" 410	" 347	" 433	" 246
" 505	" 350		" 249
" 581	" 352		" 250

Vol. IX.**Vol. X.****Vol. VIII.**

Page 49	Page 436
" 51	" 438
" 52	" 439
" 54	" 440
" 56	" 444
" 66	" 445
" 72	" 447
" 74	" 448
" 75	" 450
" 78	" 451
" 79	" 452
" 80	" 453
" 82	" 454
" 83	" 455
" 84	" 456
" 85	" 457
" 86	" 457
" 97	" 462
" 122	" 462
" 134	" 471
" 137	" 473
" 137	" 474
" 138	" 474

TABLE of CASES REPORTED

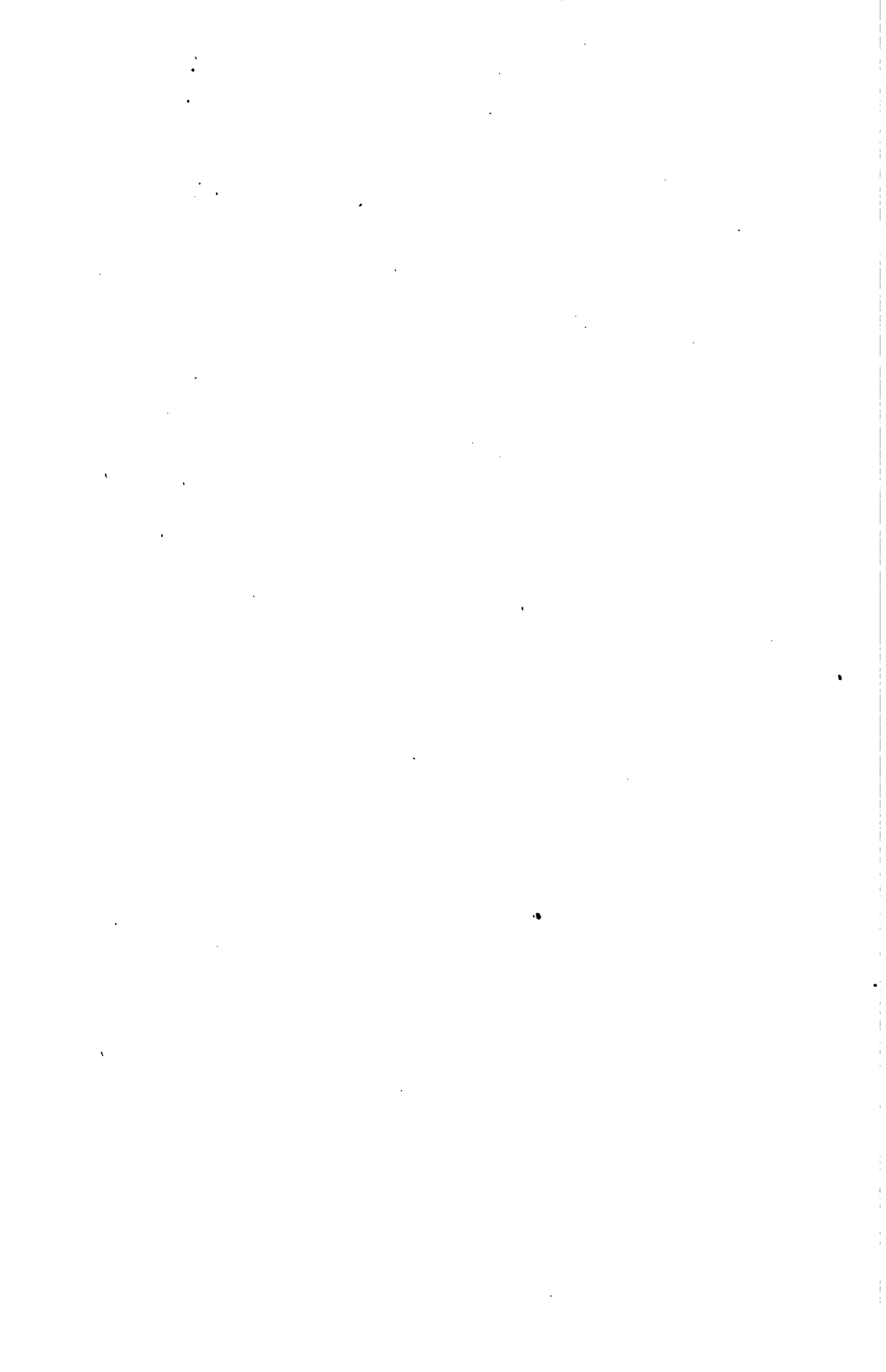
In this Reprint of Western Law Journal.

✓ Adams et al. v. Brace.....	139	Bradley v. Mason.....	380
✓ Adams v. Brig Pilgrim.....	477	Brig Paragon v. Sprague	474
✓ Allen v. Brown.....	59	Brisbane v. Staughton.....	135
✓ Amphlet v. Warrington.....	191	Brooke v. Thorp.....	169
✓ Andrews et al. v. Powell.....	126	Burgoyne et al. v. Clarkson et	
✓ Anonymous.....	254	al.....	119
✓ Anonymous.....	279	Buss & Co. v. Horrocks.....	376
✓ Anonymous.....	315	Butler v. Steam Ferry Boat...	55
✓ Anonymous.....	360		
✓ Armstrong v. Wade	57	Caldwell v. Spillman.....	308
✓ Arnold v. Phillips.....	195	Canal Boat Ætna v. Treat	229
✓ Arnold v. Reed	347	Canal Boat Huron v. Simmons	229
✓ Atkins v. Cone.....	58	Case et al. v. State et al.....	486
✓ Avery v. Latimer et al.....	46	Cemetery v. Railroad Co	316
		Cemetery v. Railroad Co.	343
Baker v. Spindler.....	192	Chapman et al. v. R. R. Co.....	559
Baldwin v. Railroad Co	532	Chapman et al. v. R. R. Co.....	565
Balser v. Singer.....	56	Clark v. Cincinnati et al.....	10
Bank v. Abernethy et al	405	Clark v. Pullman.....	135
Bank v. Bank et al.....	219	Clymer v. Stubbs	438
Bank v. Findlay et al	49	Cobb v. Voorhees.....	380
Bank v. Follett.....	87	Colville v. Gilbert	526
Bank v. Gates et al.....	63	Commissioners v. Phillips.....	135
Bank v. McLaughlin.....	202	Compston v. Lambert.....	248
Barlitt v. Woodside... ..	15	Conklin v. Phillips.....	55
Bayes v. Zimmerman.....	509	Connell v. Vorhees et al.....	24
Bayley v. Pearman et al.....	56	Cook v. Drake	12
Bates v. Lewis.....	450	Converse v. Farwell et al.....	141
Bereman v. Bank.....	218	Cory et al. v. Leutner.....	507
Berry v. Griffin.....	168	Crigler v. Lyle et al.....	485
Biggs v. Annim et al	221	Crouse v. Caldwell et al.....	359
Birch v. State.....	453	Curtiss v. Hutchinson et al....	471
Bliss v. Champion.....	492		
Borden v. Schooner Eagle.....	473	Daniels v. Stevens.....	280
Bowen et al. v. Telegraph Co..	574	D'Arusmont v. D'Arusmont et	
Bowler et al. v. Houstou.....	389	al	393
Boucher v. Lindsley.....	457	Davenport v. Dana.....	59
Boyce v. Steamboat Empress..	173	Davenport v. James.....	18
Boyd's Lessee v. Talbert.....	65	Davis v. Coffield.....	267
Brachman v. Warden et al	494	Delavan et al. v. Macarte et al.	226

Denning et al. v. Nelson et al.....	503	Insurance Co. v. Corey.....	379
Dodson v. Riddle et al.....	54	Insurance Co. v. Woolen Factory	577
Donahue v. Steele.....	130		
Dougherty v. State.....	57	Johnson et al. v. Rogers et al..	405
Drake's Exr. v. Brackett.....	56	Jones v. Ealer et al.....	385
Drouilliard v. Wilson.....	555	Jones v. State.....	390
Dux v. Lewis.....	363	Jones v. Steamboat Commerce	229
		Jonte v. State.....	52
Easton v. Perry.....	58		
Eckert et al. v. Colvin et al....	11	Kellogg et al v. Brenerman et	
Edmands v. Hiltz.....	81	al	229
Evans v. Cincinnati.....	462	Kemper v. Turnpike Co.....	57
Evans v. State.....	436	Kenohacker v. Ry. Co.....	484
Ex parte Christmas.....	594	Kinnear v. Thomas.....	413
		Knox et al. v. Strader.....	84
Feidler v. Blow et al.....	245	Kramer v. Railway Co.....	474
Ferrell v. Ferrell.....	135		
Flinn v. Admr.....	56	Lanman's Admr. v. Piatt.....	135
Foster et al. v. Bainbridge.....	97	Latshaw's Case.....	96
Fox v. Newell.....	378	Lawrence v. Jones et al	5
Fulton v. Bates et al.....	59	Layton v. Conover.....	186
		Leathers v. Cockerel.....	58
Garrettson et al. v. Hart	265	Leisure v. State.....	59
Gast v. Gooding.....	315	Lessee of Bowie et al. v. Roe ..	167
Gates v. Maxon et al.....	132	Lessee of Carr v. Lehugh.....	84
Gilman v. Speaker.....	56	Lessee of Feagley v. Higbee	
Golden's Admr. v. McConnell..	58	et al.....	183
Goodrich v. Rogers et al.....	230	Lessee of Lore's v. Truman ...	510
Goodsell v. Brig St. Louis.....	207	Lewis v. Gaylord & Co.....	73
Goodsell v. Brig St. Louis.....	229	Lewis v. Nugen et al.....	215
Greenough et al. v. Smead et al.	516	Lewis v. Schooner Cleveland...	229
Griffith et al v. Commrs. et al..	457	Litch v. Martin	585
Gurshwa et al. v. Infield.....	75	Long v. List.....	54
		Longworth et al v. Bonsall et	
Haines v. Lytle	198	al.....	85
Halstead v. Sawyer.....	456	Loomis et al. v. Plank Road	
Harbeson v. Gano.....	57	Co. et al.....	312
Haughton v. Steamboat Mem-		Lowe v. McCorkle.....	352
phis.....	403	Lowrenz v. Penn. et al.....	448
Hearn et al. v. State	262	Lyon v. Randall.....	57
Heikes v. Peepaugh et al.....	223		
Helmerking v. State.....	441	McAlpin v. Graham.....	56
Hicks v. Ins. Co	374	McFadden v. Steamboat Ni-	
Hill v. Calloway	59	agara.....	491
Hill v. State	135	McGuire v. Canal Boat.....	263
Hill v. Welsh et al	367	Mann et al. v. Lindsay.....	79
Hillyard v. Schooner Spray....	452	Manypenny v. Johnson.....	450
Holmes v. Pickering et al.....	179	Martin v. Kepner et al.....	57
Howe v. Steamboat Empire ...	477	Martin et al. v. Parker... ..	381
Hunt v. Holmes.....	50	Messenger v. Lockwood.....	433
		Meyer v. Shaney et al.....	98
Ibbottson et al. v. Wheeler & Co	58	Miller v. Bank et al	392
Imbush et al. v. Bank.....	8	Mitchell v. Chase et al.	58
In re C., H. & D. R. R. Co....	269		

Mitchell v. Towner.....	352	Smead v. Diss.....	200
Morgan v. Hayes et al.....	454	Snow v. State.....	426
Morgan v. Stittigan.....	447	Spafford v. Meagley.....	364
Morrow et al. v. Finch.....	307	Sprague v. Converse.....	405
Mott v. Larick.....	211	Stall v. Glascoe et al.....	58
Munson v. Gashorn.....	404	Staner v. Stom.....	344
Muzzy v. Commissioners.....	135	State v. Bronson.....	31
		State v. Brooks.....	407
Newman's Case.....	22	State v. Buttles.....	520
Nichols v. State.....	55	State v. Carver.....	135
Niswanger v. Staley.....	382	State v. Chenoweth et al.....	369
Nock et al. v. Miller.....	135	State v. Clark et al.....	155
Norman v. Will.....	261	State v. Crow.....	586
		State v. Crowell.....	41
Ohio Turnpike Co. v. Howard.....	26	State v. Decker.....	527
Olinger v. Hoffman.....	276	State v. Dougherty.....	37
		State v. Elliott.....	572
Parson et al. v. Brodley et al.....	128	State v. Ferrer.....	428
Paul et al. v. Ellison.....	67	State v. Fouts et al.....	214
Peak v. Myers.....	66	State v. Hoppes.....	105
Pease v. Steamboat Co. et al.....	150	State v. Lowrey.....	64
Pendleton et al. v. Myers.....	282	State v. Lyon.....	251
Pennock et al. v. Miller et al.....	456	State v. McCormick et al.....	572
Pringle et al. v. State.....	283	State v. Moore.....	171
Prior et al. v. Reynolds et al.....	366	State v. Moore.....	506
Pritchett v. Cradelbaugh et al.....	455	State v. Mount.....	89
Pugh v. Corwine.....	451	State v. Neale.....	153
Pugh v. Starbuck.....	143	State v. Noble.....	1
Putnam v. Stewart.....	573	State v. Perkins.....	55
		State v. Piatt et al.....	99
Railroad.....	546	State v. Powell.....	38
Railroad Co. v. Gill.....	501	State v. Robinson.....	483
Railroad Co. v. Martin.....	440	State v. Roll.....	284
Railroad Co. v. Sundry Persons.....	326	State v. Rose.....	550
Rapp v. Wilkerson.....	177	State v. Shields et al.....	17
Reeder v. Metcalf.....	58	State v. Stevens et al.....	82
Rice v. Buchanan.....	56	State v. Summons.....	381
Richardson v. Beebe.....	197	State v. Summons.....	416
Richardson et al. v. Wingate.....	478	State v. Townsley.....	36
Rigby et al. v. Taylor et al.....	405	State v. Walker.....	353
Roberts et al. v. Roberts et al.....	368	State v. Wilkinson et al.....	136
Robinson's Lessee v. Ward.....	252	State ex rel. Ball v. Hand.....	238
Rogers et al. v. Turner et al.....	246	State ex rel. Constable v. Moore.....	506
Rolcliff v. Beck.....	445	State ex rel. v. Flinn et al.....	551
Roller v. Kirby.....	76	State ex rel. Lee v. Judges.....	51
		State ex rel. McKinney v. Douglass.....	102
Sayre v. Langdon.....	277	State ex rel. Morgan v. Court of Common Pleas.....	20
Schooner v. Williams.....	228	State ex rel. Newman v. Clements et al.....	278
Schutter v. Williams.....	47	State ex rel. Taylor v. Nishwitz.....	370
Searington et al. v. Ellison et al.....	74	Steamboat Arkansas Mail v. Fox.....	230
Seybolt v. Burtner.....	225		
Shaw's Admr. v. Archer.....	168		
Shoup v. Green.....	381		

Steamboat Monarch v. Finley..	229	Wageman v. Brown.....	69
Steamboat Waverly v. Clements	229	Wales v. Bates.....	180
Stevens v. Railroad Co.....	335	Walton v. State.....	32
Stickney v. Bank.....	80	Ward v. Ward et al.....	257
Still v. Holland et al.....	584	Ward v. R. R. Co.....	553
Stolley v. Brooks et al.....	316	Wayne et al. v. Ins. Co. et al..	181
Stone v. Cordell.....	166	Wayne Tp. v. Fleming et al..	454
Strader v. Lloyd.....	57	Weizel v. Savings Inst.....	55
Straus v. Payne et al.....	61	Whalen's Admr. v. Glenn	57
Sutton v. McIlhaney et al.....	235	Whetstone v. Thorp et al.	414
Tabler et al. v. Wiseman et al..	497	Whetstone v. Thorp et al.....	482
Tollman v. Hefflefinger.....	404	White v. Perrine.....	58
Trustees v. Trustees.....	284	Whiton v. Ripley.....	133
Tuite v. Miller.....	247	Wilcox v. Magruder.....	350
Upjohn v. Ewing.....	480	Wildman v. Bank.....	29
Valentine v. Whitton.....	57	Wilkerson v. Rapp	178
Vattier v. Cheseldine.....	127	Williams v. Guernsey.....	233
Vattier v. Johnston.....	55	Winterhalter v. Johnson et al..	575
Vattier's Admr. v. Findlay's Ex.....	58	Wintermute v. Humphrey et al.	439
Vaughan v. Williams.....	160	Winchester et al. v. Pierson et al.....	169
		Wisely v. Barclew.....	216
		Wood v. Ward.....	589
		Zeigler v. Leibolt et al.....	404



REPORTS
OF
CASES ARGUED AND DETERMINED
IN
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CRIMINAL LAW.

23

[Court of Common Pleas, Cincinnati, January Term, 1840.]

THE STATE OF OHIO V. ROWLAND H. NOBLE.

[Reported by EDITOR OF W. L. J.]

On an indictment for murder in the second degree there may be a conviction of manslaughter.

The fact of killing being proved, the presumption of law in Ohio is murder in the second degree.

If in a sudden quarrel, the party who forced it upon the other be unintentionally killed, the slayer stands excused; for as to him the quarrel is not an unlawful one.

The English doctrine, that a party assailed must flee as far as he can, before resisting, is not law in this country.

If there be actual danger or reasonable probability of great bodily harm, though no danger to life, the party assailed is not required to retreat, but may justifiably kill the assailant in self-defense.

The prisoner, Noble, was about twenty-four years of age, and employed as bar-keeper at the Broadway Hotel. His character was in all respects good, and he was of remarkably quiet and amiable disposition. The deceased, McCann, was about forty-five years of age, much more athletic than Noble, habitually quarrelsome, and occupied as a forestaller of the markets. Very early in the morning he came to Gowdy's market wagon, asked the price of a turkey, and passed on. Shortly after, Noble came along and asked the price. While examining the turkey McCann came up, took the turkey in his hands, and claimed the right to buy it. Gowdy said it was Noble's, if he wished it. McCann threw it down angrily, and in such a manner that it rolled in the dirt. Noble remarked to Gowdy, without intending McCann should hear, that he was showing his "contrariness." McCann said, "you are a liar." Noble replied, "you are a damned liar, and if you want anything more you can have it, damn your Irish soul." McCann struck him a

heavy blow with his fist. Noble returned the blow. They grappled. Noble fell under, in the gutter, and McCann struck and kicked him in that position. When Noble got up, McCann seized him by the throat, and beat him till he cried "enough" twice. McCann went off muttering something not distinctly heard by the bystanders. Noble snatched at a bucket but found it fastened to the wagon. He then stepped forward two or three steps, seized a stone weighing four or five pounds, and threw it at McCann, who was some eight feet distant. The stone hit him on the left side of the head, producing a large fracture of the skull. McCann fell speechless, and died in a few minutes. Some one told Noble he had killed him, and he exclaimed, "My God, have I killed a man!" The whole did not occupy more than two minutes. Being told that he had better go to the mayor's office, Noble went at once, and appeared in a very distressed frame of mind during the examination. McCann had previously complained to Cromwell, the proprietor of the hotel, because Noble would not buy from him; and Noble was aware of this; but there had been no previous quarrel.

The prosecution was conducted by *Thomas J. Strait, Prosecuting Attorney*; and the defense by *John C. Wright, T. Walker and T. Jones*.

In opening the defense, this question of law was raised—Whether in this state, on an indictment for murder in the second degree, there could be a conviction of manslaughter? This was admitted to be the English practice, founded on a dictum of Lord Holt. (2 Chitty's C. L., 739; 2 Hale's P. C., 302.) But it was insisted that the constitution of Ohio was the other way. The clause relied upon is in these words, "In all criminal prosecutions the accused hath a right to demand the nature and cause of the accusation against him, and to have a copy thereof." It was urged that this guaranty could be satisfied in no other way, than by trying the prisoner upon the specific charge in the indictment, and no other, whether greater or less. But the court ruled the other way; and thus it became necessary to defend against manslaughter, as well as murder in the second degree.

28 First, as to murder in the second degree. The fact of killing being admitted, the presumption of law in this state is said to be that it is murder in the second degree. (Wright's S. C. Rep., 28.) The statute thus defines this offense: "If any person shall purposely and maliciously, but without deliberation and premeditation, kill another." It differs from murder in the first degree only in the absence of deliberation and premeditation. There is *malice*, but it is not *malice prepense or aforethought*. Was then the killing done *purposely*? There was scarcely time to form a fixed purpose; the whole thing was like a flash of lightning. And there are two facts which demonstrate that there was no such purpose. First, the seizing of a bucket, the last weapon to inflict a mortal blow with. Secondly, the exclamation, when told he had killed McCann, "My God, have I killed a man!" Nor was the stone itself, thrown without aim, likely to produce death. Had it hit almost any other part of the body, it would not have produced death; and men are only presumed to intend the natural and probable consequences of their acts. But should there be a doubt about the purpose, was the killing done *maliciously*? This word *malice* is hard to define. We cannot go to Blackstone, because in his definition he combines the two ideas of malice and premeditation. (4 Black. Com., 195, 198.) A judge in this state has said: "Malice is the dictate of a wicked, depraved, and malignant heart. It is not necessary that the malignity should be confined

to a particular ill will towards the person injured. It is evidenced by any act which springs from a wicked and corrupt motive, attended by circumstances indicating a heart regardless of social duty, and bent on mischief." (*The State v. Turner*, Wright's S. C. Rep., 27.) Mr. Justice Bayley thus defines malice: "Malice, in the common acceptation, means ill will against a person; but in its legal sense it means a wrongful act, done intentionally, without just cause or excuse." (*Bromage v. Prosser*, 4 B. & C., 247.) Perhaps the shortest definition, as applied to this case, is a wicked intention to kill. That Noble was angry there is no doubt. But malice does not mean anger. On the contrary, the sudden and reckless explosion of anger, under great provocation, rebuts the presumption of malice, which is essentially cold-blooded. The malignant, malevolent, grudge-bearing man would not have thrown that stone. He would have locked up his wicked purpose, until a more fitting opportunity. This case then lacks the two indispensable ingredients of *purpose* and *malice*, both of which must be combined in order to constitute murder in the second degree.

Secondly, as to manslaughter, which is thus defined in our statute: "If any person shall unlawfully kill another, without malice, either upon a sudden quarrel, or unintentionally, while the slayer is in the commission of some unlawful act." This does not differ essentially from Blackstone's definition. (4 Com., 191.) Here then the killing, though without malice, is yet *unlawful*; and this unlawfulness must arise either from an *intentional killing* resulting from a sudden quarrel, or from an *unintentional killing* while engaged in some unlawful act. Here was 26 a sudden quarrel, but as already shown, the killing was not intentional. No man could have been more astounded than Noble at such a result. The killing then being unintentional, was Noble, at the time, engaged in the commission of an unlawful act? If so, that unlawful act was the quarrel itself. And this is unlawful only as to him who commences it. The English doctrine, that the party assaulted must flee as far as he can before he resists (4 Black., 185), has no foundation in human nature. The true position is this: A sudden quarrel does not justify the intentional killing of the adversary, unless in self-defense. But if in a sudden quarrel the adversary be unintentionally killed, the slayer stands excused, unless he brought on the quarrel, for as to him the quarrel is not an unlawful act. In the present case McCann was the aggressor from the beginning and throughout. He was wrong in claiming the turkey; wrong in giving the lie; wrong in striking the first blow; and wrong in following it up as he did. If then the throwing of the stone be considered as a part of the sudden quarrel forced upon Noble by McCann, and there was no intention to kill McCann, the act was not unlawful.

But the case will warrant the placing of the defense on another ground, that of self-defense. The counsel here cited Forster's C. L., 273; Selfridge's Trial, 160; Goodwin's case, 1 Wheeler's Crim. Cases, 253, 434, 470. The doctrine derived from these authorities was insisted to be, that if there be actual danger, or reasonable danger, or reasonable probability of great bodily harm, though no danger to life, the party assailed is not required to retreat, but may justifiably kill his adversary. Apply then the facts to this rule of law. Noble had heard of McCann as a ruffian and bully. He knew that McCann had a grudge against him. He was attacked violently, beaten severely, and the violence was continued after he had once cried "enough." McCann left him, muttering we know not what. Could Noble be sure the worst was over? The question is not

whether there was in fact further danger, but did Noble reasonably think so, when he snatched at the bucket, and afterwards threw the stone. If so, he stands excused on the ground of self-defense.

The reporter preserved no minutes of the charge of the court, nor has he access to the minutes of the judge. His recollection is that the court sustained generally the positions of law taken by the prisoner's counsel. And he distinctly remembers the very emphatic manner, in which Blackstone's doctrine of fleeing to the wall before resisting, was declared not to be the American doctrine.

The jury in about ten minutes returned with a verdict of acquittal.

NOTE. As many of our readers may not have access to the authorities above cited on the subject of self-defense, a brief statement of them is here subjoined.

Forster's Crown Law, 273. "In the case of justifiable self-defense, the injured party may repel force by force, in defense of his person, habitation or property, against one who manifestly intendeth and endeavoureth, by violence or surprise, to commit a known felony upon either.

27 In these cases he is not obliged to retreat, but may pursue his adversary till he findeth himself out of danger; and if in a conflict between them he happeneth to kill, such killing is justifiable."

In *Selfridge's Case*, the report of which makes a volume, the facts were briefly these: There had been a dispute between Selfridge and Austin's father, originating in party politics, and leading to angry and offensive publications in the newspapers. Selfridge had received imitations that he was to receive personal chastisement, and in that expectation armed himself with a pistol. Passing down State street in Boston, he saw Austin, the son, coming towards him with an uplifted cane of an ordinary size. He drew his pistol and shot him. It is doubtful if a blow had been struck before the shot; certainly not more than one. But the cane was uplifted for a blow at the time of firing. There was a scuffle after the shot, and several blows were exchanged, when Austin fell and expired almost instantly. The whole did not occupy much more than a minute. Selfridge was indicted and tried for manslaughter. His counsel assumed the position, that even though his life was not in danger, and there was no probability of bodily harm, yet he was justified in defending himself against a disgraceful blow. The late Samuel Dexter, one of the counsel, said: "I respect the laws of my country, and revere the precepts of our holy religion; I should shudder at shedding human blood; I would practice moderation and forbearance to avoid so terrible a calamity; yet should I ever be driven to that impassable point where degradation and disgrace begin, may this arm shrink palsied from its socket, if I fail to defend my own honor." (See page 128 of the trial.) Chief Justice Parker, in charging the jury, thus laid down the doctrine of self-defense: "First, a man, who, in the lawful pursuit of his business, is attacked by another, under circumstances which denote an intention to take away his life, or to do him some enormous bodily harm, may lawfully kill the assailant, provided he use all the means in his power otherwise to save his own life or prevent the intended harm such as retreating as far as he can, or disabling his adversary without killing him, if it be in his power. Secondly, when the attack upon him is so sudden, fierce and violent, that a retreat would not diminish, but increase his danger, he may instantly kill his adversary without retreating at all. Thirdly, when from the nature of the attack there is reasonable ground to believe there is a

design to destroy his life, or commit any felony upon his person, the killing the assailant will be excusable homicide, although it should afterwards appear that no felony was intended." (See page 160 of the trial.) Selfridge was acquitted.

In *Goodwin's Case* (1 Wheel., C. C., 253, 434, 470), the facts were briefly these: Goodwin and Stoughton, who had had a previous dispute, met accidentally on Broadway in New York. As they passed each other, Goodwin pointed with his sword cane to Stoughton, and said to his companion: "There goes a coward and a scoundrel." After going on several steps, Stoughton returned and asked Goodwin if he would repeat those words. Goodwin said he would. Thereupon Stoughton struck him with his fist. Several blows followed from each. Stoughton had no weapon. Goodwin used his cane, the sword of which came out after the first blow. After four or five blows, during which Stoughton was retreating, he fell, and probably Goodwin struck him after he was down. They were then parted. Stoughton was assisted to rise, but soon fell and expired. It was then found that he had received a mortal wound from the sword. But no one saw Goodwin stab him, and the physicians inclined to think Stoughton must have fallen upon the sword during the affray, though the testimony on this point was conflicting. Goodwin was seen to have the sword blade in his hand, and probably struck with the handle. The whole affair did not last more than two minutes. Goodwin was indicted for manslaughter. On the first trial the jury disagreed. On the second he was acquitted.

WATER CRAFT.

[Superior Court of Cincinnati, July Term, 1843.]

JOSIAH LAWRENCE V. HENRY A. JONES AND OTHERS.

[Reported by the EDITOR.]

Every boat navigating the river is bound to make use of all reasonable precautions to avoid injuring, or being injured by others.

Though it be customary for a steamboat to run during a fog, she ought not to run at her highest speed, if by so doing she increases the danger to other craft.

A flatboat is bound to make use of the customary signals, whether of light or sound, to apprise a steamboat of her position; and must prove that she has done so, or that it would have been wholly unavailing.

This was an action on the case brought by the plaintiff as owner of cargo on a flatboat, against the defendants as owners of the steamboat Henry Clay, to recover damages for sinking the flatboat.

The case made by the plaintiffs was substantially this: On the night of the 28th of December, 1842, about the hour of ten, the flatboat, descending the Mississippi river, at a point about fifty miles above New Orleans, was sunk by collision with the steamboat Henry Clay, then ascending the river. The fog was so dense that persons on the flatboat had not been able to see the shore for some hours. But it was a low fog, and did not prevent the pilot of the steamboat from seeing the shores, though he could see no object floating in the river. The steamboat was running at her full speed of about twelve miles per hour; and it was

proved to be common so to run when either shore could be seen. It was also proved to be common for flatboats to run, in that part of the river, though they could see neither shore. The ordinary signal given by a flatboat at night is a light; but if there be a fog, a noise is made, either by shouting, beating upon the boat with a board, or firing a gun. The steamboat had been heard approaching for some time, but she could not be seen by those on the flatboat, until within from fifty to a hundred yards. A light had been shown from three to five minutes, but it could not be seen from the steamboat until collision had become inevitable. There was also proof that the master of the flatboat hallooed shortly after showing the light, but the testimony on this point was conflicting; and the noise was not heard on the steamboat. When the pilot of the steamboat saw the light, he stopped the engines and tried to back, but his velocity was so great that this was unavailing. He also put the wheel hard down for the east shore, but this, too, was unavailing. In fact he could not see the flatboat when her light became visible. There was much conflict of testimony, as to whether the flatboat was in the middle of the river or nearer the east shore; and as to whether she was lying crosswise or straight up and down the stream. The steamboat struck with the larboard side of her bow, on the bow of the flatboat a few feet to the left of her starboard corner, and carried away the whole of her larboard corner, so that she sunk immediately. The parties agreed to adjust the damages, and the jury were to pass upon the single question of guilty or not guilty.

T. Walker and *C. Olney*, for the plaintiff, admitted that it was customary to navigate during such a fog, and that when the pilot of the steamboat became aware of the danger, he did all he could to avoid the collision. But they insisted that the velocity of the steamboat was such as to render all precautions by either boat unavailing; and that, for this reason, the plaintiff must recover.

Fox & Lincoln, for the defendants, insisted that sufficient noise was not made on the flatboat to warn the steamboat in time; but, however this might be, the owners of the steamboat would not be answerable, if they complied with the custom of the river. And it being customary to run at full speed during such a fog, if, when the pilot became aware of the danger, he did what he could to avoid it, as had been admitted, the sinking of the flatboat was *damnum absque injuria*, and the plaintiff must bear the loss.

ESTE, J., charged the jury in substance as follows: The single question is whether the collision resulted from the negligence of those in charge of the steamboat; this being the issue made by the pleadings. If neither party was in fault, or if both were equally in fault, or if the fault was wholly with the flatboat, the plaintiff cannot recover. The question then is, whose fault caused the collision? This point being ascertained, the law is clear. Every boat navigating the river is bound to make use of all reasonable precautions to avoid injuring others; which precautions may vary with circumstances. In a fog, for example, a steamboat ought not to run at her full speed, if by so doing she increases the danger to other craft; for she must regard their safety as well as her own. A flatboat is bound to make use of the ordinary signals to apprise the steamboat of her position; and must either prove that she has done so, or that it would have been wholly unavailing. If then you believe that the speed of the steamboat was so great, that the ordinary signals of light and sound could not reach her in season to avoid the collision, you must find for the plaintiff.

The jury having returned a verdict for the plaintiff, a question as to the amount of damages was submitted to the court. The cargo was flour, part of which was saved in a damaged state, taken to New Orleans, and sold under the direction of the Port Warden. The plaintiff claimed to recover, first, the difference between the net proceeds of this sale and the price which the whole quantity would have brought uninjured; secondly, his share of the expenses of salvage, as adjusted at New Orleans; and thirdly, the notarial charges of protest and copies. The court held that the true criterion was the value of the flour at the place of disaster; but this was so near New Orleans, that no distinction could be made. The salvage being the necessary result of the collision, was also allowed. The notarial items were not allowed, because the protest was only made to charge underwriters. Judgment accordingly. Defendants appealed.

NOTE. Some of the principal authorities relied upon in the argument were as follows:

Story on Bailments, 385. In all cases of collision the essential question is, whether proper measures of precaution are taken by the vessel which unfortunately runs down the other. This is partly a question of nautical usage, and partly a question of nautical skill. If all the usual and customary precautions are taken, then it is treated as an accident, and the vessel is exonerated. If not, then the offending vessel and its owners are deemed responsible.

Ship De Cock, 2 Law Reporter, 311. The admiralty rule is, that where both vessels are in fault the damages shall be shared equally.

Schooner Aline, 3 Law Reporter, 21. Consequential damages arising from the collision may be recovered from the party in fault.

Simson v. Hand, 6 Wharton, 311. Where the collision is the effect of mutual negligence, neither party can recover in a court of common law.

Lowry v. Steamboat Portland, 1 Law Reporter, 313. Whether there be any general custom of navigation, and what it is, are matters of fact to be proved by the testimony of persons skilled in navigation. If there be such a custom, a departure from it, occasioning collision, will render the party liable, unless the other party by reasonable effort might have prevented it; and each party should act upon the presumption that the other party will adhere to the custom. To the same point see *Jameson v. Drinkald*, 12 Moore, 148; and *Handyside v. Wilson*, 3 Car. & Payne, 528.

Lane v. Crombie, 12 Pick., 177. In cases of collision, the burthen of proof is on the plaintiff, not only to show negligence on the part of the defendant, but ordinary care on his own part.

Vanderplank v. Miller, 1 Mood. & Malk., 169. The plaintiff cannot recover, unless the collision is attributable entirely to the fault of the defendant. If he were partly in fault, but the plaintiff with care might have prevented the accident, he cannot recover. But see *McGregor v. Rogers*, Wright's Rep., 582, where it is held to be no excuse that the plaintiff's boat might have been more safely moored in some other place. And as to the degree of negligence which will prevent the plaintiff from recovering, see *Lack v. Seemard*, 4 Car. & Payne, 106; *Luxford v. Large*, 5 Car. & Payne, 421; *Wolf v. Beard*, 8 Car. & Payne, 373; *Vennall v. Garner*, 1 Crompton & Meeson, 21; *Chaplin v. Hawes*, 3 Car. & Payne, 554.

Clapp v. Young, 6 Law Reporter, 111. Where it appears that one vessel has neglected an ordinary and proper measure of prevention, the burthen is on her to show that the collision was not owing to such neg-

lect; and it is no excuse for such neglect, that it was sanctioned by the local usage of a particular harbor.

Smith v. Condry, 1 Howard, 28. The actual injury sustained by the party at the time and place of collision, and not the probable profits at the port of destination, is the true measure of damages.

PAYMENT—WORTHLESS NOTES OR CHECKS NOT A VALID 49 PAYMENT.

[Supreme Court of Ohio, Hamilton County, April Term, 1843.]

IMBUSH & HORNSBY V. THE MECHANICS' AND TRADER'S BANK.

[Reported by C. D. COFFIN.]

Checks upon a bank, given by the secretary of a company for a debt due from the company, are no discharge of the debt unless they are paid.

The secretary, being a stockholder, is not a competent witness to prove the liability of the drawee of the checks, and thereby exonerate the company.

Payment in the notes of a broken bank, neither party knowing that the bank had suspended at the time, is a discharge of the debt; payment in uncurrent notes, without fraud, is a valid payment.

This was an action of assumpsit for money had and received: plea, the general issue. It was tried at the April term, 1843, of the supreme court of Ohio for Hamilton county, before Judges WOOD and READ.

The plaintiffs proved by Mr. Ewing, the secretary of the Little Miami Railroad company, who was a stockholder in that company, that about the 11th of July, 1841, he sold several thousand dollars of bonds of the city of Cincinnati to a Mr. Willis (who he understood was some way connected with the bank of West Union), and obtained a credit on that account in his bank-book for \$10,000 in currency, of the Mechanics' and Trader's Bank, an unincorporated banking association in the city of Cincinnati. On the 12th and 13th of July, he drew two checks in favor of the plaintiffs on the defendants, amounting to \$950 upon estimates of work done by them for the railroad company, which were paid the day of their date by the defendants in currency, about one-half being in the notes of the West Union bank.

The officers of the Mechanics' and Trader's bank testified that the secretary of the railroad company and Willis came out of the cashier's room together—the latter handed to the president \$6,000 in city bonds and \$5,000 West Union bank paper, for which he had before agreed to give the secretary the above credit, although he did not inform him of the agreement. The cashier entered the credit on the secretary's bank-book. The defendants continued to purchase West Union notes at two
50 per cent, the same as other currency, until the close of business on the 15th. Other persons objected to the West Union paper on the 14th, and one broker on that day asked a discount of eight per cent. On the evening of the 15th, sundry brokers of the city of Cincinnati held a meeting and resolved no longer to receive these notes. They gave notice of this in a city paper on the morning of the 16th, and with that publication the notes ceased to be current. The West Union bank suspended

on that day at one o'clock, and has never since resumed. The plaintiffs tendered the notes back to the defendants and demanded other currency, which was refused; and this suit was brought to recover the amount. It was proved that the defendants, a short time previous, had agreed to receive West Union paper to an amount equal to a judgment which that bank had recovered against them.

The defendant's counsel moved the court to rule out the testimony of the secretary because of his interest to throw the loss upon the defendants, and thereby exonerate the company of which he was a member.

They also moved for a non-suit, because the payment was made in currency, current at the time, and received in good faith as a satisfaction of the checks; and the subsequent failure of the West Union bank imposed no obligation upon the defendants to make it good. They also contended, that a *bona fide* payment in the notes of a bank which had failed discharged the debt, and cited *Bayard v. Shunk*, 4 Law Reporter, 216; *Scruggs v. Gass*, 8 Yerger, 175; *Young v. Adams*, 6 Mass. Rep., 182.

The plaintiffs' counsel contended, that bank notes were not payment if the bank had in fact failed, though neither party knew the fact, and that the loss must fall on the payer, and cited *Lightbody v. Ontario Bank*, 11 Wend. Rep., 1; and same case 13 Wend., 101.

BY THE COURT: WOOD, J. The checks given by Ewing, the witness, were for a debt due from the railroad company to the plaintiffs, and are no discharge of the original consideration, unless they were paid. If, therefore, Ewing, who is a stockholder in the company, is called to establish the plaintiffs' right to recover against the defendants, such evidence tends to exonerate the company whose interest is *his* interest. His condition is bettered if the plaintiff recover, and his testimony must be rejected.

The plaintiffs seek to recover on the ground, that the bank notes they received on their checks were uncurrent, *at the time they were paid out by the defendants*, but there is no evidence to sustain the assumption. On the other hand it is proved beyond question, that West Union bank paper *was* current in Cincinnati until the day after the last of these checks was paid, if not longer, and most probably until the close of the second day. The bank was not closed until the third day.

There is, however, another ground on which alone this court would direct a *nonsuit*, had the plaintiffs proved their case as laid. It was held by us on this circuit, in Scioto county, that payment in notes, neither party knowing that the bank had closed its doors at the time, was a discharge of the debt; and that payment in *uncurrent notes*, if there was no fraud, was a valid payment.

The supreme court of New York is against us. The supreme court of Pennsylvania is with us to the fullest extent; and we are left to follow either the one or the other as our own judgments dictate. It is a question between unfortunate but honest holders of paper, both having received it for a valuable consideration, on whom the loss shall fall. *The equities of the parties are equal*, and we think justice would be promoted and litigation lessened by leaving such loss where, in the course of business, it falls.

Judgment of nonsuit.

Chas. Fox, for the Plaintiffs.

Gwynne & McLean and Wright, Coffin & Miner, for the Defendants.

STATUTE OF FRAUDS.

[Superior Court of Cincinnati, July Term, 1843.]

HENRY CLARK V. CITY OF CINCINNATI AND OTHERS.

[Reported by the EDITOR.]

Held, That making improvements under a parol lease is such part performance as takes the case out of the statute of frauds.

Clark filed his bill in chancery to enforce an award of damages against the city for opening Commerce street through his property, and for an injunction until the damages should be paid. The injunction was allowed, but afterwards dissolved by consent. The principal controversy between Clark and the city was, as to which of several successive awards should stand. This part of the case was argued by *William Greene*, for Clark, and by *S. M. Hart*, city solicitor.

Cowles & Co., tenants of Clark, filed their answer and cross bill by T. Walker, their solicitor, claiming to be indemnified, either by Clark or the city, for the loss of improvements made by them, under the following circumstances: On the 10th of February, 1842, they agreed to take from Clark a lease of a brick warehouse for three years at a rent of \$125, with a covenant for quiet enjoyment. Clark drew up a paper with his own hand, intended for a lease, and brought it to them for inspection. They agreed to the terms, but one of the firm being absent, it was mutually agreed to postpone the signing until his return. In the meantime, they were to take possession and treat the lease as taking effect from its date. Before commencing improvements they heard a rumor that Commerce street was to be opened. They called on Clark, and he assured them it would not be done; that when the lease was signed his covenant would protect them; and until then they should have his verbal assurance of indemnity. They then proceeded to erect improvements to the amount of \$1,500. When these were completed and the absent partner had returned, they called on Clark to sign the lease; but he, having heard that the street would be opened, refused to sign it. He continued, however, to receive the rent until it became necessary to tear down the building.

The counsel for Cowles & Co. made the following points:

1. The paper prepared by Clark with his own hand, in which it is said, "the said Henry Clark hath rented," etc., is signed by him so as to comply with the statute of frauds. (Long on Sales, 57; 2 Leigh's Nisi Prius, 1048; *Profert v. Parker*, 1 Russel & Mylne, 625.) But on this point the court gave no opinion.

2. But if this is to be regarded as merely a parol lease, the erection of improvements is such a part performance as takes the case out of the statute of frauds. (4 Kent's Com., 451; *Wilber v. Paine*, 1 Ohio Rep., 251; *Moore v. Beasley*, 3 Ohio Rep., 294.) The court sustained this point, and held that Cowles & Co. were in for three years as much as if the lease had been signed.

3. As lessees, Cowles & Co. are entitled to indemnity; but whether from Clark or the city, is the question (*Foote v. The City of Cincinnati*, 11 Ohio Rep., 408; *Parks v. The City of Boston*, 15 Pick., 198; *Ellis v. Welsh*, 6 Mass., 246.) The court held that under the circumstances the indemnity must come from Clark; and the case was referred to a Master to ascertain the amount.

WATER CRAFT.

64

[Supreme Court of Ohio, Hamilton County, April Term, 1843.]

ECKERT ET AL. V. COLVIN ET AL.

[Reported by J. L. MINER.]

A boat in the Ohio river, *made fast to the Ohio shore*, is not within the jurisdiction of the state of Kentucky, nor amenable to process of that state.

The officer serving such process is a trespasser.

This was an action of trespass tried in the supreme court for the county of Hamilton, at the April Term, 1843, before Judges WOOD and READ.

The declaration averred, that the plaintiffs were owners of the steam-boat Commodore; that the defendants on the 1st of December, 1839, pretending to act under a writ of attachment, issued by the circuit court for the county of Campbell, in the state of Kentucky, directed to the sheriff of said county, entered upon and seized said boat while lying moored at the wharf of Cincinnati in Hamilton county, and carried away and detained the same from the plaintiffs, which was the trespass complained of.

The parties agreed to the following facts: That plaintiffs became owners of the Commodore in November, 1839, and owned and were in possession of her at the time of the alleged trespass. That in May and June, 1839, John and Nathan Florer, defendants in this suit, furnished provisions to said boat amounting to \$120.08, which amount was unpaid. That to collect their claim the Florers employed Jefferson Phelps, Esq., a lawyer in Campbell county, Kentucky, another defendant, to sue the boat under a statute of Kentucky, which suit was brought in November, 1839, on the chancery side of the Campbell county circuit court, by virtue of which a writ was issued directed to the sheriff of Campbell county, commanding him to attach the said boat, should she be found in his bailiwick, which writ was delivered to Colvin, the other defendant, a deputy of the sheriff, to be executed; all which proceedings were according to the law and practice of Kentucky, and would have authorized a seizure of the boat in Campbell county. That Colvin seized the boat by virtue of said writ while lying in the Ohio river at Cincinnati.

By other evidence it was shown, that the boat was made fast to the Ohio shore by a line in the usual manner. That the stage of the river was from four to six feet above low water. That the boat drew seven feet of water. That the side of the boat towards the Ohio shore was about seven feet from the water's edge, and connected with the shore by gangway planks. That Colvin came on board and seized the boat, but without removing her took a bond for her delivery.

READ, J. Charged the jury, that boats on the Ohio river made fast to the Ohio shore, are not subject to the jurisdiction of Kentucky for the service of process. That legal process of a court in Kentucky, served by an officer of such court on a boat made fast to the Ohio shore, will not protect the officer from liability as a trespasser.

The jury returned a verdict of guilty against Colvin and assessed \$700 damages. There being no evidence to connect the other defendants with the actual trespass, they were acquitted.

The counsel for defendants excepted to the opinion of the court, and the case will probably be taken to the court in bank.

Chase & Ball, for the Plaintiffs.

Wright, Coffin & Miner, for the Defendants.

Counsel cited the following authorities: Deed of cession from the state of Virginia, Chase's Stat., 62; Ordinance of 1787, Chase's Stat., 69; The compact with Virginia, Kentucky Stat., 45; The act of congress admitting Kentucky, Kentucky Stat., 50; The act of congress admitting Ohio, Chase's Stat., 71; The act of Kentucky asserting jurisdiction, Kentucky Stat., 268; *Ex parte Jennings*, 6 Cowen, 544, note; *Fleming v. Kinney*, 4 J. J. Marshall, 158; *Handy's Lessee v. Anthony et al.*, 5 Wheaton, 374.

AMERCEMENT.

[Court of Common Pleas, Sandusky County, Ohio, March Term, 1841.]

SAMUEL COOK v. JOHN DRAKE.

[Reported by O. BOWEN, President Judge of the Second Circuit.]

Held, that where a sheriff has two executions issuing from different counties, and levies them both on the same land lying within one of the counties, and returns a copy of the appraisement to that county in which the land lies, he is not liable to amercement for not returning a copy to the other county.

This was a motion to amerce the sheriff. At the February term of the court of common pleas, 1840, held in Sandusky county, Samuel Cook recovered a judgment against Pierce Taylor for \$902.28, upon which he issued a *fi. fa.* to the sheriff of Williams county on the 9th of March, 1840. On the 25th of the same month, Drake, who was then sheriff of Williams county, indorsed as follows: "By virtue of two writs of *fi. fa.* to me directed, one from the court of common pleas of Williams county, and the other from the court of common pleas of Sandusky county, I have levied upon the following real estate, etc., (describing it to be in Williams county), taken at the suit of *Payne C. Parker v. Pierce Taylor*, and *Samuel Cook v. Pierce Taylor*." He further returned that he had advertised and offered it for sale, but it remained unsold for want of bidders. At the court of common pleas held in Williams county, September, 1837, Payne C. Parker recovered a judgment against Pierce Taylor for \$135.93, on which a *fi. fa.* issued to the sheriff of that county, December 3, 1839, and was returned as follows: "I have levied this execution, together with one directed to me from the court of common pleas of Sandusky county, on certain lands," etc. An appraisement of the lands, thus taken in execution by the sheriff, under these two writs, was duly made on the 25th of March, 1840, and a copy of the appraisement deposited with the clerk of Williams county. No copy was sent to Sandusky county. The report of the appraisers specified their proceeding to be under both executions. The lands were appraised at \$1,100.

This motion is predicated on the fact that the sheriff *neglected to return a copy of the appraisement*, made as above stated, to the county of Sandusky, from which Cook's execution issued.

C. K. Watson, for Plaintiff.

A. Coffinberry, for Defendant.

BOWEN, P. J. The foregoing facts were admitted in proof by the parties on the hearing of the motion. They must, therefore, be regarded as part of the sheriff's return. For what was true in *fact*, may, when omitted or improperly set forth, be added by the sheriff, if necessary either for his own protection, or the protection of the rights of others. The question then arises, whether a return that the lands were levied under two executions, issuing from different counties, in favor of different plaintiffs against the same defendant, and regularly appraised at a given sum, and a copy of the appraisal returned to the office of the clerk of the county in which the lands are situated, is a compliance with the law.

The statute, page 103, section 10, requires the sheriff to call an inquest of three disinterested freeholders of the county where the lands are situate, to make, under oath, an appraisal of their value, and report their doings to him. The 11th section provides, "that the officer receiving such return, shall, forthwith, deposit a copy thereof with the clerk of the court *from which such writ issued.*" It is quite plain that the author of the law had in view but one execution in the framing of this section. It did not probably occur to him, or to the legislature, that several executions, from as many different counties, might, at one time, come into the hands of the officer to be levied on the same property; and hence the total silence of the act as to the duty of the officer in such a case. Giving the section, in its present language, its full meaning, and it cannot be claimed that the sheriff is bound to return more than *one copy* of the same appraisal. No inconvenience could arise, under this rule, where the executions all issued from the same court. It is only felt, or supposed to exist, when they are issued from several counties. The plaintiff's counsel contends that the failure of the sheriff to send a copy to the county from which the writ issued, would prevent a confirmation of sale, in case one was made, and thereby subject the plaintiff to delay and costs in the collection of his money. That the court would refuse to confirm a sale, made in a case like the present, when the sheriff returned that he had levied two executions on the land at the same time, and had caused an appraisal to be regularly made, and a copy thereof deposited in the office of the clerk of the court of the county in which the estate is situated, and from which one of the writs issued, and which operated as a prior lien thereon, is a point we are not now prepared to concede. We incline to a different opinion. But if such should be the consequence to the plaintiff in execution, he cannot obtain redress against the officer, unless the law, in its terms, have secured to him that right. 106

It being admitted then, for we think such is the law, that the sheriff's duty requires of him to return but *one* copy of the same appraisal, it may be asked, in case of the levy of several executions from *different* counties, in which shall the copy be deposited? A discretion is necessarily thrown upon the sheriff by the want of a statutory direction to him in such a case. Were one of the writs issued from the county in which the lands lie, it would be the exercise of a sound discretion to make the deposit in that county, and it would probably be most convenient to those interested to have him do so. But if the copy should be sent to another county, in connection with one of the writs levied, it would not violate provisions of the statute. His return, if made with

the particularity observed in this case, would apprise each plaintiff in execution of the levy—the inquest—the amount of valuation, and the county where the copy was deposited. Ought we to require more of the sheriff? In case of a sale, any of the courts from which writs issued, on being satisfied that the sale had been made in conformity to law, would confirm it. The officer's return should furnish such evidence, and if it be found satisfactory without the production of a copy of the appraisalment, that might be dispensed with. If not, the court would, doubtless, require it. No confirmation would be made unless the court should be satisfied that the land was appraised, and sold for two-thirds its valuation.

We have thus attempted to show that the sheriff is not only guiltless of any breach of duty, but that the evils which the plaintiff's counsel supposes must await and be visited upon his client, by not being furnished with a copy of the appraisalment in Sandusky county, are not likely to arise; but in case of their actual occurrence, they must be attributable to defective legislation, rather than to the misconduct of the sheriff. If we are mistaken in this view, there exists another objection against giving the judgment moved for in the plaintiff's notice.

In the 32d section of the act to which reference has been made above, the causes, for which the officer may be amerced, are set forth. "Neglecting to call an inquest, according to the foregoing provisions of the act, AND return a copy thereof to the clerk's office," is made one of them. This provision was read by plaintiff's counsel, and is relied upon to support this motion. The whole section has received, from the time of its enactment, a strict construction. The courts have uniformly refused judgment against the officer, unless he came within its express letter. *Wright's R.*, 720; 6 Ohio Rep., 449. The fault is here punished by *penalty* for "neglecting to call an inquest, AND return a copy." Both omissions must occur to constitute the offense. *Failing to return a copy* of an appraisalment, actually made, could not subject the officer in this penal proceeding. There must be connected with it a failure, also, to make the *inquest*. It is in this latter that the mischief principally consists, for no sale can be perfected until there has been an appraisalment, but as the time is not limited in which the copy shall be returned, the proceedings would be held valid, and the sale confirmed, though several terms of the court might intervene between the inquest and the return, provided it was made before or at the time of sale. It would, doubtless, be an improper disregard of duty in the officer, but not cause of *amercement*. The proof in this case shows, and the plaintiff admits, that a levy of his execution, in connection with another, was duly made—an inquest called—an appraisalment had, and a copy of it returned to the office of the clerk of Williams county, from which one of the writs issued.

A motion to *amerce* is a complaint of misfeasance. It is a proceeding against one charged with the execution of a public trust or duty, both penal and summary in its character. In his defense, he is restricted to terms unknown to any other cause, civil or criminal. He is compelled to answer at the first term of the court, and, if a resident of the county, upon only two days' notice. The form of pleading applied to other cases, is dispensed with. A bare notice of the charge preferred against him is all that is required. He is not allowed a trial by jury, and the court which acts in the matter, has very little discretion. The statute makes it imperative to render judgment of *amercement* where the charge is sus-

tained. It seems proper, in such a proceeding, under such a statute, to exact of the party complaining *strict* proof of the alleged delinquency. He should clearly show that the letter and spirit of the statute had been violated by the officer, before he asks the court to pronounce judgment against him. We have shown, as we think, satisfactorily, that the present case is not within the spirit or letter of the statute, and must, therefore, dismiss the motion at plaintiffs costs.

NOTE—A record of the foregoing case was presented to Judges WOOD* and LANE, at the July term of the supreme court in Sandusky county, 1841, and indorsed by them, *non allocatur*, as the plaintiff's counsel informed me.

COMPETENCY OF WITNESS.

[Court of Common Pleas, Crawford County, October Term, 1843.]

DANIEL BARLITT ET UX. V. MOSES WOODSIDE.

[Reported by O. BOWEN. President Judge of the Second Circuit.]

Whether a party who has produced a witness and had him sworn, but not examined, thereby waives objections to his competency when called by the other party, *quære*.

In an action on the case for erecting a mill dam and overflowing plaintiff's land, where the defendant was a lessee, and had given up possession after the commencement of the suit, a subsequent lessee, not holding under the former, is a competent witness for him.

The plaintiffs, having offered evidence of their possession of the land, and of the injury to it by the backing up of the water in the dam kept up by the defendant, rested.

The defendant then called as a witness, George Hemerg (who had been called to the stand and sworn by plaintiffs, but not examined). He stated that the defendant left possession of the mill in April, 1843, that this suit was brought in January, 1843—that witness had since leased and was now occupying the mill and keeping up the dam, precisely as it had been kept up by the defendant, though not under the latter—that about one year ago the race of the dam broke away, and witness and divers others in the neighborhood, turned out to repair it, and that the plaintiff and sons were among those who gave such assistance, and furnished materials; and that no objection was made by Barlitt and wife to the repairing and keeping up the dam, at that time, nor did they claim to have been damaged by it, although the dam had stood there some years, affecting their land as it did at the commencement of this suit.

Stewart, for the plaintiffs, objected to the introducing of this testimony: 1. Because it established a license, and was inadmissible under the general issue. 2. The witness was incompetent, on account of his interest, to give evidence in this cause.

Scott, for the defendant, insisted that the plaintiffs had waived all objections to the witness, by having him sworn, and that defendant was now at liberty to use him. He cited 1 Phil. Ev., 4th Am. ed., 274.

BOWEN, P. J.

The remark of Mr. Phillips, referred to by the defendant, and upon the authority of which he claims to examine Hemerg as a witness, is as follows: "If the witness is sworn and would be competent to give evidence for the party calling him, the other party will, in strictness, be entitled to cross-examine him, though he had not been examined in chief." To support this position the author cites *Rex v. Brooke*, 2 Stark. N. P. C., 473; *Phillips v. Eamer*, 1 Esp. N. P. C., 337. The case in Starkie was an indictment for perjury. The attorney for the prosecution was called and sworn, and produced a copy of the declaration in an action brought by the defendant against the prosecutor, but was asked no question on the part of the prosecution. The defendant insisted upon his right to cross-examine him as a witness called for the plaintiff. ABBOTT, C. J., who tried the cause, was of opinion that in strictness the defendant was entitled to cross-examine. The other case is not at hand, but goes as far to sustain the author, probably, as the case in Starkie.

If these cases sanction a rule in Phillips, it is believed there never has been an adoption of it here. *Ellmaker v. Beekley*, 16 S. & R., 77. A party may, by mistake or accident, call to the stand and have sworn a witness most deeply interested against him, on discovery of which he would forbear to ask him a question. We are not able to perceive how such an act can operate as a waiver of objections.

As this action is founded on the plaintiff's title in justice and equity to recover a compensation in damages, the defendant may, under the general issue, give in evidence any facts or circumstances, which, in equity and conscience, are sufficient to bar the plaintiff's claim. 2 Stark. Ev., 212. If the plaintiffs encouraged the erection of the dam, and afterwards voluntarily assisted in repairing it and keeping it up, for the sake of having a mill in their neighborhood, knowing at the time how it affected their premises, they ought not to recover. They cannot, with propriety, ask reparation for their own act, or for what they have done of their own accord, jointly with others.

• The authorities do not agree as to the competency of the witness, Hemerg. It is understood that the rule has not been uniform in the supreme court of this state, in the trial of causes on the circuit. If a verdict for the defendant in this cause could be evidenced against the plaintiffs in another action which they may bring against the witness, he is incompetent. He cannot be allowed to manufacture proof for his own protection. We think, however, that such a recovery could not be set up against a future action by the plaintiffs. It can neither determine their rights, nor can it fix the liability of the witness, should he be sued for the injury. *Sir F. Evelyn v. Haynes*, cited in 3d East, 365; *Shafer v. Stonebraker*, 4 Gill & John., 345; *Standish v. Parker*, 2 Pick., R., 20; *contra*, *Vooght v. Winch*, 2 Barn. & Ald. R., 462; *Strull v. Boingdon*, 5 Esp. N. P. C., 56; see also Cowen & Hill's notes to Phil. Ev. 844, n. 594, where the question is examined, and the various authorities referred to.

The witness will be permitted to testify. Verdict for plaintiffs, and appeal by defendant.

CRIMINAL LAW.

118

[Court of Common Pleas, sitting as a Criminal Court, at Cincinnati, July Term, 1842.]

THE STATE OF OHIO V. WILLIAM SHIELDS AND JOHN ROBINSON.

[Reported by the EDITOR.]

Assaulting with intent to kill. Stabbing with intent to kill or wound. Self-defense.

Theodore Marsh, only twenty years of age, and rather below the ordinary size, was employed in the store of Wm. Q. Hodgson. He slept alone in the counting-room at night, and kept a loaded horse-pistol lying near him. On the 18th of May, 1842, shortly after midnight, he was waked by a noise like raising or shutting the window. When he retired, the window was down, and the shutters closed but not fastened. Thus suddenly roused, he could not determine whether the noise was made by persons trying to enter, or getting out; but he could hear low voices on the outside. He seized the pistol and hastened to the door, having no covering but his shirt. He saw the prisoners standing near the window. Robinson was a stouter man than he, and Shields stouter than Robinson. Marsh charged them with entering or attempting to enter the store; they made no reply, but began to move away. Marsh called the watch, and told them he would shoot if they attempted to escape, and a second time called the watch. At this moment Shields stabbed him on the right side above the hip. Marsh fired, but missed him. He then struck him on the head with the pistol, felling him to the ground, and leaving part of the lock in his head. Robinson now sprung upon Marsh, and both fell. In this position Marsh received a cut on his left leg, but immediately struck Robinson on the head with his pistol, and got up. By this time Shields was up and renewed the contest, which continued first with one, then with the other, until Marsh had felled them with his pistol at least four times. Shields was now lying in the gutter, and Robinson had crept under a dray, when the watch came up. Marsh was just able to tell them to seize the men, when he fainted with loss of blood. The watch found the shutters open and the window down, but there was nothing to show that the store had been entered. Robinson had no shoes on, and gave contradictory accounts as to what had become of them. A butcher-knife was found lying near, but no blood on it. Shields had a small knife in his pocket which had the appearance of blood on it. The wounds of Marsh were so severe, that in the opinion of the surgeon the chances were at first ten to one against his recovery, though he did finally recover.

The prisoners were indicted for stabbing with intent to kill, stabbing with intent to wound, and assaulting with intent to murder.

W. B. Caldwell, Prosecuting Attorney, conducted the prosecution. *J. J. Collins*, and *A. G. W. Carter* were assigned as counsel for the prisoners. They relied upon the absence of criminal intent, the wounds being given in self-defense.

WALKER, P. J. The fact of stabbing is unquestioned. What was the intent, to kill or to wound? The statute makes either sufficient to convict. The intent to wound seems to be a necessary inference from the mere fact of stabbing. The intent to kill must be gathered from other circumstances, such as the weapon used, the place, number and nature of

the wounds, and the like. If you think death the natural and probable consequence of the wounds, you may infer that death was intended. And it is immaterial which of the prisoners inflicted the wounds, if both were present and participating. If you convict of stabbing with intent to kill or wound, you need not inquire further, for this is the greater offense. If not, you will inquire whether there was an assault with intent to murder. An assault is an attempt or offer, with force and violence, to do some corporal hurt to another. If the attempt or offer be carried into effect, there is more than an assault; there is battery also; and the only question is as to the intent. Was it to commit murder? In other words, if Marsh had been killed, would the prisoners be guilty of murder? If they were attempting to commit a burglary, it would have been murder in the first degree. If not and they had yet killed him maliciously, it would have been murder in the second degree. Either will satisfy the statute. But if you think the killing would have been manslaughter only, you cannot convict. And this must be the case, if you believe, 120 either that there was no intention to kill, or, if an intention, that it was the effect of passions roused in a sudden quarrel, and that there was no malice, that is, no culpable disregard of another's rights. But the prisoners rely upon the right of self-defense. If you believe there was an attempt to commit burglary, that is, to break and enter the store with intent to rob or steal, they cannot justify on this ground. If not, then the question is, whether Marsh assaulted them in such a manner as to create a reasonable apprehension of great bodily harm? If he only required them to wait until the watch came up, this would not justify them, though innocent of his charge, in attempting his life. Mere threats never throw a man upon his ultimate rights. There must be an attempt or offer, at least, to do them some bodily harm. The sum is this. If you believe that the prisoners were lawfully there, and that Marsh not only threatened, but attempted to shoot them, before they assailed him, it is a case of self-defense; otherwise not. Finally, if you believe that there was an unlawful assault, but no intent to murder, you may convict of assault and battery only.

The jury returned a verdict of guilty generally, and the prisoners were sentenced to the penitentiary for twenty years, being the longest time, under any of the counts. On their way to the penitentiary they escaped. The sheriff offered a reward accompanied with a description of their persons. They were apprehended in Jeffersonville, Ind., in the act of stealing from a house in which they had obtained lodging; were delivered to the sheriff who had offered the reward, and are now working out their sentence.

PLEA IN ABATEMENT.

[Superior Court of Cincinnati, October Term, 1843.]

ALVAN DAVENPORT v. JAMES A. JAMES.

[Reported by R. M. CORWINE.]

Where the defendant pleads in abatement a misnomer, alleging that he was baptized, and has always been known by another name, and issue is taken on the question of baptism, proof that he has always been known by another name, will not sustain the plea.

This was an action of assumpsit against the defendant as the in-

dorser of a promissory note made by George Conclin in favor of the defendant, and by him indorsed in the name of *J. A. James*.

The defendant filed a plea in abatement, to the effect that he was *baptized* by the name of *Joseph*, at Newark, in the state of New Jersey, and by the christian name of Joseph hath always since his baptism hitherto been known and called. This plea was verified by affidavit.

The plaintiff filed a replication to the effect, that the said defendant was *not baptized* by the name of *Joseph*.

The case was submitted to the court. The affirmative of the issue being with the defendant, he proceeded to introduce witnesses, who proved that they were well acquainted with the defendant, and that they had never known him called by any other name than that of *Joseph*. Some had known him for a great many years, and had done business with him, and that was the only name by which he was known and called.

The plaintiff then moved the court for judgment, on the ground that the defendant had wholly failed to make out his case. It was contended by the counsel for the plaintiff, that there was but one issue for the consideration of the court, which none of the proof of the defendant tended to establish. One of the allegations of the plea was, that the defendant was *baptized* by the name of *Joseph*. The plaintiff had taken issue thereon. The defendant must prove such act of baptism, according to the issue tendered. It was not enough that he was generally known and called by that name; for if he was not baptized by that name, it was ~~not~~ *by the name of his baptism* that he was called, as is alleged in his plea. Before he can be called by the *name of his baptism* he must have been baptized. It does not follow, because a man is called and generally known by a particular name, that that was the name given to him at his baptism. In support of these positions, the counsel cited *Welcker v. Le Pelletier*, 1 Camp., 479, which is the leading case on this subject, and directly in point, the pleadings being identically the same.

On the part of the defendant, it was contended, that he was not bound to prove anything more than the name by which he was generally known and called. That the allegation of *baptism* was an immaterial averment, and could be treated as surplusage; that the common reputed name of the defendant having been proved, and found 161 to be different from that by which he was sued, he was entitled to judgment.

ESTRÉ, J. Whatever may be the opinion of the court as to the manner in which this issue is tendered, it is certain the issue has not been proved by the party tendering it. The court must look to the issue made up. Whether, therefore, the question of *baptism* is or is not an immaterial issue, is not now before the court. The only matter the court has to dispose of is, was the defendant baptized by the name of *Joseph*, in manner and form as alleged in his plea? If he was, then the plaintiff must go out of court, and the defendant must have his costs. On the other hand, if he has not established that fact, having voluntarily taken upon himself to do so, then the court must render judgment for the plaintiff. The proof is, that the defendant has always been known and called by the name of *Joseph*, and as far as the witnesses know, never was called by any other name. Does this establish the issue made up? We think not. It does not certainly follow that a man was baptized by a particular name, because he was always so called and known, amongst those with whom he has associated. The case cited by counsel from 1

Campbell is decisive of this point. It is not enough that a man is generally known by a particular name to support this issue; he must have been *baptized* by that name. Judgment for the plaintiff.

R. M. Corwine, for the Plaintiff.

J. Frazer, for Defendant.

163

MARRIAGE.

Is a Negro Entitled to Solemnize Marriage.

[Supreme Court of Ohio for Brown County, March Term, 1843.]

STATE OF OHIO EX REL. JOHN MORGAN V. COURT OF COMMON PLEAS
OF BROWN COUNTY.

[Reported by Judge LANE.]

Whether a negro, who has been regularly ordained as a minister, is entitled, under the law of Ohio, to a license to solemnize marriage, *quære*.

At the term of 1842, the relator made application for a mandamus directed to the common pleas of this county, commanding them to issue ¹⁶⁴ to him a license to solemnize marriages. He produced credentials from Bishop Soule, that he was regularly, by the imposition of hands, set apart for the office of deacon of the Methodist Episcopal church, and thereby recommended to all whom it might concern, as a proper person to administer baptism, and perform the ceremonies at marriages and funerals. He further produced proof that there existed a Methodist society or church, of colored persons, at Red Dale, in said county, of which he was the regular stated preacher. An alternative mandamus was issued, upon this proof, commanding the court of common pleas to issue the license, as asked for, or to show cause to the contrary at the next term.

At the present term two of the judges filed the following statement, upon which they relied as a return to the writ:

"The undersigned, associate judges of the court of common pleas, in the aforesaid county, respectfully state, that it is true, as alleged by John Morgan, that he made application to said court for authority to solemnize marriages in due form of law, and that said court was divided upon the propriety of granting such authority, by which his application failed. The reasons which operated upon the undersigned, who were unwilling to grant him such authority, were, among others, the following:

"1. The said John Morgan is a negro; and by the law of Ohio regulating blacks and mulattoes, incapable of giving testimony in any case, in a court of justice, where a white person is a party to the controversy.

"2. The law in relation to marriages, requires the justice or minister who may solemnize the same, to return under his hand, to the clerk of the court of common pleas, the fact of such solemnization, that it may be recorded. The legislature, in making this provision, obviously intended that the record so made, as well as certified copies of it, should be evidence in all courts of justice, of the facts it contains.

"3. But if authority be given by the common pleas for a black or mulatto to solemnize marriage, then that provision of the law is rendered nugatory, which disqualifies him from giving testimony where a white person is a party; for his certificate of having performed the marriage ceremony between two whites, or between a white person and a black, or mulatto, would, when recorded, become evidence in court; and thus his statement in writing must be received as testimony, in a case where, if he were personally present, the law positively forbids the court to hear him. The motion therefore, to grant such authority to John Morgan, was regarded as a proposition to violate the law, which the judges are bound by the most solemn obligations to sustain and administer in good faith.

"It is true the statute specifying what ministers shall have license to solemnize marriage, does not specially exempt blacks or mulattoes. But all parts of the law are to be taken together; and when the legislature declare what persons are incompetent to testify where whites are parties, and then provide that the fact of a marriage shall be proved by the certificate of the minister solemnizing the same, the undersigned are unwilling to charge the body with the absurdity of intending to authorize a black man to give such a certificate. They are loth to believe; that the legislature intended that a mere certificate, *not under oath*, should be evidence, when the solemn oath of the certifier could not be received if he were personally present. 185

"4. The law regards marriage as a civil contract, entered into by the parties; and certain forms are required to render it valid. In the administration of these forms certain officers are specified, whose interposition becomes necessary—the clerk of the court of common pleas, and a justice of the peace: or a minister duly ordained, in good standing, and officiating in the county where he applies for license, may be substituted for the justice. In so far as the minister takes upon himself the authority to solemnize marriage, he is an officer of the law. It is the law that clothes him with this authority. His religious functions do not give it to him. It is not because he believes, or preaches any particular religious faith, or doctrine, that he is authorized to marry, but because the legislature, through the court, have declared him a proper person to exercise a portion of the civil power, made his acts valid, and binding on the parties, upon all the world;—and provided that his official certificate shall be as binding in courts of justice, as the official certificate of a justice of the peace, who acts under oath, or as the official acts of the clerk of the court, who acts under a like solemnity.

"Now, blacks or mulattoes have neither the right of suffrage, nor are they eligible to office in Ohio. They can exercise no civil power whatever over the people of this state. The constitution and laws of the state forbid it. Their particular occupation or employment; their religious creed or practice, can furnish no exception to this rule. By what course of reasoning then, can we arrive at the conclusion, that they shall officiate in giving sanction or validity to the marriage contract—the most important and solemn compact, which exists in civilized society; the one in fact, upon which all others rest, and without which they could not be sustained?

"5. The applicant, John Morgan, did not present any evidence to the court of common pleas, to show that he was either a citizen of the United States, or of the state of Ohio. Blacks and mulattoes, like him are prohibited by law from settling in Ohio, except upon certain condi-

tions. Whether he has ever complied with those conditions is unknown to the undersigned. If he have not, and the license asked for had been granted, it would present the singular anomaly, of a person residing in the state, and exercising important functions, with which the law, through the instrumentality of a court of justice, had clothed him, liable at any moment to be driven from the state, as an interloper, whose very presence here was a violation of our statutes. Nay, more—even those who employed him to solemnize marriage, with such a license in his pocket, would themselves be guilty of a misdemeanor, by our laws, for which they would be prosecuted, and fined in a heavy penalty.

166 "For these and other reasons which it is unnecessary to enumerate, the undersigned refused to grant John Morgan a license to solemnize marriage. All of which is respectfully submitted.

"DAVID JOHNSON,
"WEIBLE WEAS."

The case was reserved by the judges to be decided on the circuit, and judgment was entered in Portage county, at the term of September, 1843. No opinion on the merits was expressed *publicly*; but the statement being the act of two of the judges, and not the act of the court, and not authenticated by the seal, was held no return to the writ, and a peremptory mandamus was awarded.

168 HABEAS CORPUS—ATTACHMENT—CONTEMPT.

[Court of Common Pleas, Hamilton County, Ohio, July Term, 1843.]

GEORGE NEWMAN'S CASE.

[Reported by W. VAN HAMM.]

The court of common pleas may issue writs of *habeas corpus*.

An attachment may be issued against a person for contempt of court, who neglects and refuses to obey and make return of a writ of *habeas corpus*.

Under "an act declaratory of the law concerning contempts of court," passed February 24, 1834 (statute 211), the charge or specification need not be filed, until the party is brought into court, by virtue of the attachment.

The omission of the master to cause the indenture to be recorded within three months from the execution thereof, according to the sixth section of the "act concerning apprentices and servants," passed March 8, 1831 (statute 63), does not discharge the apprentice from his service.

Upon the application of Reuben Newman to the court of common pleas of Hamilton county, a writ of *habeas corpus* was issued to Nancy Roberts, of Cincinnati, commanding her to have the body of George Newman, a child of about three years of age, together with the day and cause of his caption and detention, before the court, on a certain day therein named.

On the day mentioned in the writ, the defendant appeared in court with the child, but refused to make any return of the cause of the caption and detention. Whereupon, by order of the court, a rule was issued against the said defendant, to show cause why an attachment should not issue for contempt of court, and no cause being shown, an attachment was accordingly issued.

The defendant being attached and brought into court, the applicant, by his attorney, filed a written charge or specification, Stat. 211, 212, in which the said defendant is charged with having disobeyed and resisted the lawful writ of the court, in neglecting and refusing to obey and make return of said writ of *habeas corpus*, according to the command thereof. 169

It was objected by the counsel for the defendant, that the court of common pleas had no authority to allow a writ of *habeas corpus*, and that therefore the proceeding was null and void *ab initio*. That this writ can only be allowed by a single judge, either of the supreme or common pleas court, Stat. 433. Upon reference to the fourth section of the "act to organize the judicial courts," Stat. 222, which authorizes the courts of common pleas to issue writs of *habeas corpus cum causa*, and all other writs not specially provided for by statute, the court overruled this objection.

The second objection raised was, that an attachment could not be issued in such case because the *habeas corpus* statute, Stat. 433, section 4, provides as a penalty for refusing or neglecting to obey or make return of such writ, a forfeiture to the party aggrieved, for the first offense, of two hundred dollars, and for the second offense, of four hundred dollars, etc. The court decided that an attachment could be issued against the defendant in accordance with the provisions of the statute "concerning contempts of court," before referred to. Stat. 211, 212.

It was also objected that the attachment was wholly null and void, for the reason that the charge or specification was not filed until the defendant was brought into court under the attachment—and that it should have been filed prior to the issuing of the attachment. The court overruled this objection, and gave its opinion that the charge need not be filed until the party is attached.

The defendant then made return that she was entitled to the custody of said child, under a certain indenture made by the said Reuben Newman (the father of the child), and her husband John Roberts; by which indenture the boy was bound to the said John Roberts until he became twenty-one years of age, for the purpose of being instructed in the trade of a blacksmith. And further, that she was entitled to his custody, from the fact that she had nurtured and protected him from his infancy—he having been placed in her charge, voluntarily, by his father, at the time of signing and sealing the indenture.

The testimony in the case showed that Reuben Newman, the father, at the time of making the indenture, was a widower with five children—that he is now a married man—of good character, industrious, and well able to take care of his children. That about three or four years ago he was an intemperate man, but for two years past was entirely reformed—and that his present wife is industrious and of good character. That John Roberts had been absent, in Canada, about eleven months, and during that time did nothing towards providing for the sustenance of the child. That Nancy Roberts was a woman of good repute, and had taken good care of the child for about eighteen months, the period of time elapsed since the making of the indenture. It also appeared on the production of the indenture, that it had never been recorded. 170

It was argued on the part of the applicant:

1. That the father was entitled to the custody of his child, unless he had done some act by which the law deprived him of its custody, or was incapable of taking suitable care of it. To this point was cited

The King v. De Manneville, 5 East., 221; *Com. v. Addicks*, 5 Binn., 520; 2 Kent, 194, 205; *Com. v. Robinson*, 1 S. & R., 356; 1 Brown's Penn. Rep., 143.

2. That the indenture was absolutely void, for the reason that it had never been recorded—and that in consequence of the *failure of the master to record the indenture within three months from the execution thereof, the apprentice was discharged from his service.* Stat. 64, section 6.

3. That admitting the indenture to be valid, it could only be so in the hands of John Roberts, the master, and that no third person, by assignment or otherwise, could claim a right to the custody of the child under and by virtue of it.

4. That John Roberts had forfeited all right and title under the indenture, by reason of his long absence, and his failure to provide for the sustenance of the child.

5. That being a man of good character, and well able to provide for his child, there could be no reason why the father should not have the custody of it.

The defendant's counsel cited *Harber v. Heis*, Wright's Rep., 19, in which case Judge Wright, under the act of 1824, 22 Revised Stat., 381, says "we incline to the opinion that the time of recording, provided in the statute, is directory." In that case the court decide that *the master cannot avoid his covenants by an omission to record, because it would be to avail himself of his own neglect, though the apprentice might avoid the indenture.*

The court (CALDWELL, J.), was of the opinion that the child was not discharged by the omission of the master to record the indenture, and refused, under all the circumstances, to interfere in behalf of the father.

W. Van Hamm, for Applicant.

W. M. Corry, for Defendant.

LIABILITY OF MAIL CONTRACTORS.

[Superior Court of Cincinnati, October Term, 1843.]

ISAAC CONNELL v. JOHN VOORHEES AND PETER VOORHEES.

[Reported by A. E. GWYNNE.]

Held that mail contractors are not liable for money abstracted from letters by a driver in their employ.

The object of this suit was to recover from the defendants, who were mail contractors between the town of Oxford, Butler county, Ohio, and the city of Cincinnati, four hundred dollars contained in a letter placed by the plaintiff in the postoffice at Liberty, in Union county, Indiana, directed to an individual at Cincinnati, and which, it was alleged, passed in its transit the town of Hamilton, in Butler county, Ohio, but was never delivered at the postoffice in Cincinnati. A demurrer to the three first counts in the declaration presented the question of law to the court, whether a mail contractor is liable for the negligence of his agents in carrying the mail.

B. Storer and *A. E. Gwynne*, for the defendants, referred to the following authorities: *Whitfield v. Lord Despencer* Cowp., 754; *Lane v. Cotton*, 1 Ld. Raym., 646; S. C. 1 Salk., 17; S. C. 11 Mod. R., 12, 18; S. C. 12 Mod., 473, 492; *Nicholson v. Mounsey and Sims*, 15 East. R. 392; 2 Dane's Abr., 439, J40; 2 Kent's Comm., 610; Story on Bailments, 300—308; Story on Agency, 306—311, 319, 320, 321, 322, 328; *Bolan v. Chapman*, 2 Bay. R., 551; *Dunlap v. Munroe*, 7 Cranch. R., 242; *Schroyer v. Lynch*, 2 Law Reporter, 229, and to the postoffice law.

W. R. Morris, for the Plaintiff, referred to *Jones v. Voorhees*, 10 Ohio R., 145, and to *Bolan v. Williamson and Chapman*, 2 Bay. R., 551.

ESTE, J. Connell claims to recover of the defendants, on the ground of the negligence of their servants or agents in carrying the mail. The counts presenting that state of fact are demurred to.

This is a new case. It was so admitted at the bar, and has so appeared to the court, upon an examination since the argument. The course of decisions, which are claimed to be analogous, is to be found in suits against postmasters for the neglect of their subordinates. In the first case of this kind in England, Lord Holt dissented. Not to examine the English authorities farther, it was in that case decided, that the suit was not maintainable. In *Dunlap v. Munroe* (7 Cranch 242), the principle of this first case in England is upheld. The case cited from Bay's reports does not show any different opinion in that court as to the principle of decision in the supreme court of the United States, that an officer of government is responsible only for his own acts, provided he use due care in selecting his agents.

Here it is claimed that the mail contractor is responsible for the acts of his agents. It is said, by defendant's counsel, that *pro hac vice* he comes within the decisions. They admit the Messrs. Voorhees to have been common carriers, except as to the mail; the counsel for the plaintiff say they are common carriers as to everything. The case cited from 10 Ohio Reports, was decided in this court, as in the court in bank, and determines that the Messrs. Voorhees are common carriers as to the baggage of a passenger.

Reference is made to the postoffice law. It is there enacted that the postmaster general shall provide for the carriage of the mail on all post roads, and authority is conferred upon him to make contracts for the same. The person contracting must be considered as standing in the shoes of the postmaster general, as to the subject matter of his contract. Oaths are taken by all persons employed in the conveyance of the mail. It is not contemplated that the postmaster general himself shall superintend the carrying of the mail. Again, the contractor cannot himself carry the mail over the whole line of his contract. As to the transmission of the mail, he represents the postmaster general, and he necessarily employs agents. Now the question before the court will be decided by inquiring what are the duties of the mail contractor. They are—to provide a safe, commodious conveyance, and careful, diligent, steady, temperate drivers. Having performed these duties, having furnished such a coach and having employed such agents, he is not responsible for the neglect or misfeasance of these agents. The acts of a mail contractor, as mail contractor, are as much those of the post-office department, as those of the postmaster. That department was established as much for the conveyance of the mail, as the receipt and

distribution of letters and the collection of postages. It is not for this court to re-examine the decisions as to postmasters. Under the law, as established by those decisions, the contractor is liable for his own misfeasance, but if he employ careful agents, he is not liable for their negligence or misfeasance. The demurrer is sustained.

The case will probably be taken to the supreme court.

216

TURNPIKE CO.—RECEIVERS.

[Court of Common Pleas, Clermont County, Ohio, October Term, 1843.]

THE OHIO TURNPIKE COMPANY V. WILLIAM HOWARD.

[Reported by OWEN T. FISHBACK, President Judge of the Tenth Judicial Circuit.]

A receiver appointed under the act to regulate the mode of collecting debts against turnpike companies, etc., passed March 5, 1842, does not necessarily possess the power to appoint gate-keepers, or contract for necessary repairs on such road.

The court will from time to time, when necessary, enlarge the powers of the receiver so as to secure the object of his appointment, and give him full protection in the discharge of his duties.

Several decrees having been rendered at a former term of this court in favor of the creditors of the Ohio Turnpike company, and William Howard having been appointed receiver in each several case, and a portion of the tolls collected at the gates on the road having come to his hands, a motion is now made, on behalf of the company, for an order on the receiver to pay over to the officers and agents of the company the sum of \$4,000 for the purpose of making necessary repairs on the road.

On the part of the creditors and the receiver, this motion is resisted, on the ground that the act of the legislature of Ohio, passed March 5, 1842, invests the receiver with competent power to direct and superintend the construction of such repairs on the road as from time to time he might deem necessary and proper, and that he also possesses the further power to appoint and control the gate-keepers on the road, according to his own judgment and discretion.

The company, however, deny that the exercise of such powers are conferred on the receiver by the act in question, either in express words or by necessary implication; or that the making of repairs on the road, the appointment of the collectors of tolls, etc., are essential to the proper discharge of the duties of the receiver; and insist that there are duties, obligations and penalties imposed by the several laws in force in relation to turnpike companies, from which they are not relieved by the act of March, 1842, and that those duties are not thrown upon the receiver.

If it can be perceived, that the Ohio Turnpike Company can and does retain the power to exercise its corporate franchises in the appointment of toll gatherers at the several gates, and the directing and making the necessary repairs on the road, and that the exercise of such powers does not necessarily come in conflict with the powers and duties of the receiver, then it might be supposed that there was no serious difficulty in the present question.

Reference has been made to the several acts regulating the duties, liabilities and rights of turnpike companies as furnishing means to a correct conclusion on this question.

The act of January 7, 1817, Swan's Stat., 976, section 4 provides that each director, when elected, shall take an oath or affirmation, diligently and impartially to discharge the duties of his office. 217

The 5th section of the same act provides "that the president and directors shall appoint such officers and agents as may be necessary," etc. By the 17th section it is further provided, "that such companies shall keep an account of their expenses—that the state or county may purchase their road—that their books shall be open to inspection," etc.; and on refusal to comply with the provisions of this section the corporate powers must cease and determine.

By the act of 10th March, 1836, Swan's Stat., 988, the court of common pleas are clothed with power to appoint inspectors of turnpike roads. The 6th section provides, that, for neglecting to keep the road in repair, the gates may be thrown open; and the gatekeeper is made liable to a penalty, if he demand or receive any toll, whilst the road shall remain unrepaired; and the company shall be liable to any person injured by reason of the road remaining out of repair.

The act of March, 1840, Swan's Stat., 863, provides for declaring of dividends, and reporting to the auditor of state; and imposes upon the company the penalty of \$500 for neglect of duty.

By the act of March, 1841, it is further provided, that turnpike companies (when the state is, or may become a stockholder) are authorized, with the consent of the board of public works, to graduate the tolls, etc.

By the charter of this company we find, that the directors, when elected, are required to take an oath; they shall elect a president *who shall sign all contracts*; and the president and directors shall in all cases manage the concerns of the company, appoint such officers and agents as may be necessary, fill all vacancies, and may require an oath or affirmation of any of the agents of the company. Penalties are imposed for not keeping the road in repair—the directors shall keep a fair account of their expenses—their books shall be kept open to the inspection of the agents of the state—and a forfeiture of the corporate franchises is declared on a failure of duty.

The several acts of a general nature, together with the act of incorporation, leaves no doubt as to the specific powers, duties and liabilities of the company, its officers and agents.

The directors shall take an oath—they may cause an oath to be administered to any of its agents—they may consult with the board of public works on the graduation of tolls—they shall keep an account of their expenses—their books shall be open to inspection—inspectors under the appointment of court may order the gates to be thrown open, and a penalty is imposed for the reception of tolls whilst the road is out of repair—they are exposed to damages sustained in consequence of the road being out of repair—the company is liable to make compensation to the owners of land from which materials may be taken for the purpose of repairs, and they are exposed to a forfeiture of the corporate franchises for a neglect of duty.

If the act of 1842 gives the receiver the power of appointing gate-

218 keepers, of contracting for and directing the necessary repairs on the road, what are the functions left to be performed by the company, its officers or its agents? Can the penalties, which are provided for in the acts referred to, be enforced? and upon whom will the liability rest? Who shall *sign the contracts* for repairs? Who administer the oath to the gatekeepers? And how, and by whom shall compensation be made to the owners of land, from which materials are taken for repairs?

If the legislature, by the act of March, 1842, intended to divest the company of *those* powers and duties, and to discharge it from these penalties and liabilities, did it thereby intend to cast those responsibilities on the receiver? But we regard it unnecessary to press these inquiries further.

It is contended, however, that the power of appointing gatekeepers and making necessary repairs must exist with the receiver *by necessary and irresistible implication*; these are positions we are not prepared to admit.

All the duties which the charter imposes, and all the rights and privileges which it extends to the company, its officers or agents, can be exercised and maintained in full force in superintending and contracting for the repairs of the road and in the appointment of gatekeepers, without any conflict with the receiver in the discharge of *his* duties, in "*receiving the tolls collected.*"

The state of Ohio having an interest in this and several other similar incorporations, and the impracticability of the creditor's obtaining the fruits of his judgment at law (the tolls not being subject to levy on execution), together with the various contingencies to which the proceeds of the company are subject before any one creditor would have the right to claim an appropriation in satisfaction of his claim, may have suggested the passage of the act of March, 1842; which act we are disposed to regard as directory rather, than as giving additional remedies or conferring new powers. In this act we think the legislature meant what they have said, and intended no more than they have expressed in the wording of the act, in which we see no ambiguity, nor anything left to *inference or intendment*. The receiver is to "*receive the tolls collected,*" not to appoint gatekeepers to collect them; he is "*to pay out of such tolls the expense for necessary repairs,*" not to make the repairs himself, decide upon their necessity, or enter into any contract or engagement for that purpose.

But it is supposed, that if the powers of the receiver be restricted to the mere reception of the tolls, his appointment will be unavailing, and that nothing beneficial will result to the creditor; that the whole amount of tolls received may be expended by the company in needless repairs upon the road, and that they may prohibit their gatekeepers or other officers from paying tolls collected into the hands of the receiver. We cannot say that such emergencies will not happen, or that they are impossible; but, are we not constrained to act upon the presumption, that all the parties concerned will do that which is right, and deport themselves in obedience to the requirements of the law?

219 Should we fail in these expectations, it will be recollected that all the parties in interest are still before us, and must be retained in court until the purposes of the decree are answered, and that by the rendition of the decree against the company and the appointment of the receiver, the accruing tolls of the road are confiscated for the benefit of the creditor; and this court, in the exercise of its jurisdiction common to equi-

table jurisprudence, is vested with the full control of the proceeds of the company so far as they are subject to the claims of the creditors, and will retain the exercise of that power over the parties until the assets are all exhausted, or until there shall be full satisfaction of the claims of those interested in the distribution.

The appointment of a receiver is a matter that has been regarded as incidental to the exercise of chancery jurisdiction, and is always addressed to the sound discretion of the court; and in virtue of his appointment he is to be regarded only as a *receiver*. It often happens however, that an enlargement of his powers becomes necessary, as when the perception of the rents or profits of an estate are committed to him; although he may be required to lease the estate to the best advantage, yet he will possess no power to remove a tenant who refuses to *attorn* to him, without the special order of the court. So when the owner of the estate may be in possession, he cannot be removed and the receiver let in, without an application to the court for that purpose; nor will he be permitted to apply the trust funds in repairs (to any considerable extent) without a previous application for that purpose.

In this case therefore the receiver will in the first place "*receive the tolls collected*," but should he meet with any obstruction or resistance in the discharge of his duties by the officers or agents of the company, it will be for this court on being made acquainted with the facts to *enlarge* his power and protect him in the performance of his duties. Should a conflict of opinion arise between the receiver and the company on the subject of repairs, it will be the further duty of the receiver to report the facts to the court, that by a proper reference the truth may be known; and such steps will then be taken as may seem proper and necessary.

As the motion in this case seems to have been made to elicit the opinion of the court in regard to the powers of the receiver, and no sufficient state of facts being established to warrant the action of the court, the motion is overruled.

BANK DEPOSITS.

220

[Court of Common Pleas, Erie County, Ohio, June Term, 1842.]

FREDERICK S. WILDMAN V. THE BANK OF SANDUSKY.

[Reported by O. BOWEN, President Judge of the Second Circuit.]

Held, that the Bank of Sandusky was bound to pay deposits in specie, although received under a special contract with the depositor to receive payment in current bank notes; there being no power in the charter to make such a contract.

ASSUMPSIT.

First count of declaration, for that the defendants had received of the plaintiff, on deposit, at their banking house in Sandusky city, the sum of five hundred and sixteen dollars, and had credited the same to the plaintiff on the books of the bank, and held it for his benefit. And afterwards, on, etc., the plaintiff demanded the same of the cashier, at the banking house, in *gold* or *silver*, and payment was refused, etc. Second count, for money had and received.

First plea, the general issue. Second, that the plaintiff, on the 28th of October, 1840, had a note payable at the bank for five hundred and seven dollars and eighty-two cents, signed by Kneeland Townsend, payable six months from date, and requested defendants to receive it, as agent of plaintiff and collect the money; that defendants received without fee or reward from the maker of it, the amount when it became due, in *bank bills*, then passing current as money, at the counter of the bank, and in all the common business transactions of the state of Ohio; that the bills were received by the bank in payment of the note, in accordance with the ordinary and usual practice of agents, and other persons employed in collecting notes in the state of Ohio, and also in accordance with the understanding between the plaintiff and defendants concerning the kind of money which should be received upon the said note by the defendants. That the money, when collected, was carried to the plaintiff's credit, on the books of the bank, as a special deposit, payable to the plaintiff or order, in *currency*, meaning in bank bills passing current at the counter of the bank, of which plaintiff had notice, and was therewith satisfied and content; that defendants have always been ready and willing, and have offered to pay, in *bank notes* currently passing as money, the amount so received for plaintiff. The third and fourth pleas were substantially the same as the second, averring that the money was received in bank bills, as a special deposit, and upon an agreement with the plaintiff to pay him in current bank bills, and that defendants have been ready and offered to do so.

The plaintiff demurred specially to each special plea: 1. Because the matter pleaded amounts to the general issue. 2. The pleas are double. 3. They do not answer the whole declaration. 4. The matter pleaded does not answer any particular count or part of the declaration.

¶ *Parish & Saddler*, for Plaintiff.

Beecher, for Defendants.

BOWEN, P. J. The special pleas plainly seek to present, in a direct form, a question of law, for the consideration of the court. More regard has been had to this, than to an observance of strict technicality in the form adopted. We choose to omit any discussion of the special causes assigned for demurring.

Can the bank enforce a contract, for the payment of deposits made in it, in any thing but gold or silver? The plaintiff, by his demurrer, admits that he agreed to accept, in return for the sum collected for him by the bank, such current bills as might be passing at the counter of the bank, when he should require payment. Yet, notwithstanding this, he demanded of the cashier the amount received for him in gold or silver. The defendants deny, under the agreement, any right of the plaintiff to make such a demand, and urge their willingness and offer to pay, at all times, in current bank bills, in bar of the action.

The fourth section of the act incorporating the bank (32 vol. local laws, 413), declares, "that the bank shall not, at any time, suspend or refuse payment, in gold and silver, of any of its notes, bills, or obligations, due and payable, or of any moneys received on deposit." There is no clause in the charter authorizing the bank to receive, in deposit, any money on any other terms. It may determine for itself such funds as it will take, subject to be repaid in coin, if demanded. A contract, like that set up in the pleas, is of no higher character than an agreement to receive payment of bills issued by the bank, in *currency*. Bills of

this description, even in the hands of the party receiving them, would not be exempted from the payment of specie, on demand, simply because the bank is vested with no power to make such a contract, and issue such bills. Its charter restricts its dealings, in this particular, to the circulation of paper payable in gold or silver. So it is in regard to *deposits*. The charter is equally explicit—the reasons for both equally apparent, and equally strong.

Within the authority delegated by the charter, the bank may make all contracts, and do all acts, which the directors may deem proper, to promote the interests of the bank. Beyond the defined and expressly conferred powers, there is no permission to act, or to become a contracting party, though it might facilitate business transactions, and greatly promote commercial affairs, to have the power of participating in, and becoming a party to a contract like that made with the plaintiff. The bank would always proceed at its peril, when it overstepped the boundaries of the charter. *Bank of Chillicothe v. Swayne et al.* 8 O. R., 257.

The demurrer is sustained.

NOTE. This cause was appealed to the supreme court of Erie county, and at the July term of that court, 1843, a judgment sustaining the demurrer, was rendered therein.

CRIMINAL LAW.

222

[Court of Common Pleas, Erie County, Ohio, September Term, 1842.]

THE STATE OF OHIO V. PHILIP E. BRONSON.

[Reported by O. BOWEN, President Judge of the Second Circuit.]

Held, That a peddler's license is not the subject of forgery under the law of Ohio; and therefore it is not perjury if one falsely swear that such license was forged.

Indictment for Perjury. The prosecuting attorney called as a witness, Daniel Chandler, who testified that he was a justice of the peace of Erie county, in 1841; that as such he administered an oath to defendant as to the truth of the affidavit. The defendant seemed at the time to be in haste to get out a writ. The state then offered in evidence the following paper, which was identified by the justice to be the original affidavit, sworn to and subscribed before him:

"*State of Ohio, Erie County, ss.* Before me, Daniel Chandler, one of the justices of the peace of said county, came Philip E. Bronson, who being duly sworn according to law, deposeth and saith, that on or in the winter of 1839 and 1840, Daniel B. Turner did alter a *peddler license*, made at, and by the clerk of Greene county in the year 1839. Said license was drawn by said clerk of Greene county, Ohio, he believes, for three months, for said Philip E. Bronson, and that said Turner did alter the same to read twelve months, as he verily believes. PHILIP E. BRONSON."

"Sworn to and subscribed before me, at the county aforesaid, this 30th day of December, 1841. DANIEL CHANDLER, J. P."

The attorney for the state offered further to prove, that the affidavit was *false*, and that the defendant knew it to be so at the time of subscribing it.

Reber, Prosecuting Attorney, and *Osborn*, for the State.

Beecher and *Root*, for Defendant.

BOWEN, P. J. If the affidavit charge the commission of any crime against the laws of this state, the justice was authorized to take it, and the defendant may be found guilty, if it were false. But if it charge no crime for which *Turner* could be punished, it is a nullity, as to any legal proceedings, however *morally* guilty the prisoner at the bar may be.

The 22d section of the act for the punishment of crimes (p. 233), declares, that if any person shall falsely make, alter, forge, or counterfeit any record, or other *authentic matter of a public nature*, or any *charter*, *letters patent*, etc., etc., enumerating the several instruments which may be the subject of forgery, but not including "*peddler's license*," unless embraced in that part of the section above quoted, he shall be deemed guilty of a misdemeanor.

223

The counsel for the state claim that a peddler's license is an *authentic matter of a public nature*, or a *charter* or *letters patent*, and they have read from Webster's dictionary definitions of the two last terms. In construing a criminal statute, it is proper to give the terms the meaning they are used for expressing. The terms *charter* and *letters patent* are used to denominate certain objects, and are understood, in common parlance, to imply those objects; and though they may have significations which import other things, they are to be understood in their usual and most ordinary acceptance. The legislature intended to punish the forgery of a charter as a written instrument, executed with the usual forms, given as evidence of a grant, or contract; and the same of letters patent. The phrase, *authentic matter of a public nature*, is a vague term. It may include justice's dockets, the records of township clerks, and the like, but it cannot include a license or other private paper. The act granting licenses to peddlers gives a name to the commission they receive, authorizing the vending of goods. It is called a *license*. Throughout the act it is so named. It is so called and understood among people. It was created by the statute, and if it be intended to punish the forgery of it, the law should so specify. In this state no forgery can be punished, of any document, record, paper, or instrument, not expressly named in the statute. More legislation is undoubtedly necessary on the subject. But at present, we entertain the opinion that the affidavit offered does not lay a foundation for a prosecution for perjury.

Verdict—not guilty.

256

CRIMINAL LAW.

[Ohio Supreme Court in Bank, December Term, 1843.]

ANDREW WALTON V. THE STATE OF OHIO.

[Reported by W. M. CORY.]

Held, That where there is an equal division of opinion, on a writ of error in a capital case, as to granting a new trial, the court must order the prisoner to be executed.

Andrew Walton was tried at the last sitting of the supreme court at

Cincinnati, before Judges WOOD and READ, upon an indictment charging him with having murdered John Carrell.

A bill of exceptions was signed by the court, the material part of which is as follows:

"Be it remembered, that on the trial of the above case, it was proved, that the prisoner had a verbal dispute with the deceased, and that some minutes afterwards the prisoner waylaid the deceased and killed him with a knife. That it was left doubtful upon the evidence, whether the prisoner was, or was not, in a state of intoxication at the time when the said dispute occurred, and thence up to the time when the offense was committed. That the court decided that the fact, that an offense had been committed in a fit of intoxication, can make no difference in favor of the offender, and that it could make no difference in the present case."

W. M. Corry, for the prisoner, applied to Judges LANE and READ, sitting in the supreme court for Warren county, for a writ of error. The motion was supported by an argument in open court, and the writ was granted returnable to the court in bank.

On the 27th of December, 1843, the case was argued, orally, before the court in bank, by *W. M. Corry*, for the prisoner.

The statute of Ohio (Swan, p. 229, section 1), enacts, "That if any person shall purposely and of *deliberate* and *premeditated* malice, or in the perpetration or attempt to perpetrate any rape, arson, robbery or burglary, or by administering poison, or causing the same to be done, kill another; every such person shall be deemed guilty of murder in the first degree, and upon conviction thereof shall suffer death.

"Section 2. That if any person shall *purposely and maliciously*, but without deliberation and premeditation, kill another, every such person shall be deemed guilty of murder in the second degree, and on conviction thereof shall be imprisoned in the penitentiary, and kept at 287 hard labor during life."

By this enactment a distinction is made entirely unknown to the common law, which does not recognize different degrees of murder. Murder in the second degree, as defined by the statute, is murder at common law, there being no malice in manslaughter. The words "purposely and maliciously," are equivalent to "*malitia præcogitata*," for the word "purpose" implies previous reflection, or "premeditation."

But there is a great deal of difference between premeditation and deliberation. The word "premeditation" signifies precogitation—simply a previous thinking; whereas, "deliberation" means a circumspect, cool, and sedate previous thinking. At common law, a simple precogitation is required to constitute the crime of murder, and that will suffice under the second section of this statute. But when the precogitation or premeditation is not "deliberate," or cool and sedate, then, although the offense is murder under the statute of Ohio, still it is of the second degree only.

The legislature of Ohio having a greater abhorrence of capital punishment than the founders of the old common law, and out of tender consideration for the infirmities of human nature, evidently did not intend to apply capital punishment in cases of murder, however unjustifiably, maliciously, and purposely committed, when the offender was not in the full possession of his faculties, and acting deliberately. If the state of the mind of the offender, at the time when the offense is designed

and committed, be such as to exclude the idea of deliberation, the crime is reduced to the second degree.

The intention of the legislature was to confine capital punishment to the most aggravated cases of murder; as where one with a sedate and deliberate design, kills another in cold blood, or where the murder is committed in the perpetration, or attempt to perpetrate any rape, arson, etc.

It is perfectly clear, that if, upon the trial of an indictment under this statute of Ohio, it appears that the prisoner was, from any cause, incapable of deliberate premeditation, he cannot be convicted of murder in the first degree. It does not signify at all whether this incapacity was caused by voluntary excess in devotion, study, drinking, or any other indiscretion or impropriety, or was the consequence of some circumstance, over which the prisoner had no control. If from any cause whatever he was incapable of deliberation, he cannot be convicted of murder in the first degree, *as the statute requires deliberation to constitute that offense.*

He did not contend, that intoxication would reduce the crime of homicide to manslaughter, unless the death should have been produced by a stick or other weapon not of a deadly kind, or there are some other circumstances, from which it may be inferred, after making due allowance for the disturbed state of the prisoner's mind, that he did not design to kill, but only to inflict some bodily harm. The opinion of HOLROYD, J., in Grindley's case (1 Russell, 8), must be taken with this qualification. And see *Pennsylvania v. McFall* (Addis., 257).

If a drunken man kill another with a pistol, it will be presumed that he intended to fire the pistol, and also to cause death, except in the very unusual case where the intoxication is such as to totally deprive the party of reason, so that he has no faculty to distinguish the nature of actions, to discern the difference between moral good and evil. A drunken man has, in ordinary cases, sense enough to form a purpose, and therefore may have malice aforethought. But intoxication may so confuse and disturb the mind as to prevent deliberation, and it is quite clear, that if, from any cause whatever, the prisoner was incapable of deliberation, within the meaning of the first clause of the statute, he cannot be properly convicted upon that clause, for it expressly and unqualifiedly, without any exception, requires deliberation, as well as, and in addition to, purpose, premeditation and malice, to constitute the crime of murder in the first degree.

It may be said that public policy requires that intoxication should be disregarded upon a trial for an offense. The most refined people of antiquity, whose laws form the basis of the greater part of modern jurisprudence, did not entertain any such idea of public policy; the rule with them being "*per vinum delapsis capitalis pœna remittitur*;" (4 Bla. Com., 26), and there is no reason why justice and humanity should not be perfectly consistent with true policy.

He claimed for the jury, in every case, a right to say whether the prisoner was capable of the deliberation mentioned in the statute. It would not be correct, after telling the jury, that in deciding the degree of guilt, they are to ascertain whether the murderous design was formed in cold blood, circumspectly and sedately, to add, "but, gentlemen, there is an *exception* to this requisition of the statute, if the prisoner was incapable of deliberation on account of his having made himself drunk." The statute inculcates no such doctrine; it does not say, that *if the prisoner's incapacity to deliberate was the consequence of his own indiscretion, then deliberation shall be dispensed with.* No such exception is made by the

legislature, and none such can be made by the court. The statute, in requiring deliberation to constitute the crime of murder in the first degree, has utterly swept away the gothic extravagance that a man, absolutely insane when he commits a crime, is more depraved than the cool, designing villain. An approximation is made to the more enlightened rule of the civil law.

In the present case the court were equally divided in opinion: Judges LANE and READ being in favor of granting a new trial; and Judges WOOD and BIRCHARD against it. Another division of opinion then took place as to the effect of the previous division, and the court resolved (Ch. Justice LANE dissenting) that the judgment of the court below was thereby affirmed, and the prisoner was ordered for execution on the 23d of February, 1844.

NOTE BY THE REPORTER. The act of March 7th, 1831 (Swan, 731, section 2), enacts, "That in all cases of conviction, when the punishment shall be capital, the judges or court, allowing such writ of error, shall order a suspension of the execution, *until such writ of error shall be heard and determined*; and upon hearing of such writ of error, they shall order the prisoner to be discharged, a new trial to be had, or *appoint a day certain for the execution of the sentence*, as the nature of the case may require." 259

It is submitted that under this statute the execution must be suspended until the writ of error is "determined," and that it takes a majority of the judges to form a determination within the meaning of the statute. Where there is a division in the English courts of quarter sessions, upon appeal, in civil cases, under a statute requiring the court of appeal "to hear and determine the case," the order below is not affirmed, but the cause is continued. *Bodinier v. Warlingen* (2 Bott., 726). There can be no doubt that if the court of quarter sessions were, upon a division, to affirm a *conviction*, appealed from in a criminal case, the court of Queen's bench would, if the fact appeared on the face of the proceedings, quash such order of affirmance upon *certiorari*.

The question in this case, depends entirely upon a similar statute—it is not affected by our practice in civil cases. It is true that on general principles, if a motion be made, as for a new trial, and the court be divided thereon, the party takes nothing by his motion, for the court cannot do the act required in consequence of the division.

The effect of a division of the court upon a writ of error, in civil cases, depends entirely upon the way in which the question is put to the court. Thus in the English House of Lords the question put is "Shall the judgment be reversed?" If there be not a majority for the reversal, the judgment stands, and executes itself—the House not being required to do anything. But in the Queen's bench, in a like case, the cause is continued. (Tidd's Prac.; 1 Strange, 387.)

It seems, likewise, that a judge who is of opinion that a conviction is illegal, cannot, consistently, concur in appointing a day for the execution of the sentence. Under this statute the court are required, after the determination of the writ, to appoint a day certain for the execution of the sentence, or to grant a new trial, etc. A new trial could not be granted on account of the division, and for the same reason no new sentence ought to have been pronounced.

If argument were wanting on so plain a proposition, nothing enforces the necessity of an alteration of the practice in bank more fully than this

erroneous decision. The cases decided there, are reserved to that court of last resort, on account of the magnitude of the principles concerned. But the rule is that they shall be discussed on paper, which is a most disadvantageous mode for many reasons. As a consequence of this rule, the bar, which would otherwise surround the greatest tribunal in the land, remains at a distance, and the lawyers send up their printed briefs, instead of attending in person. So that when the court are in doubt, they are destitute of the important assistance which they could obtain from oral discussion, by advocates on each side of the doubtful question.

260 In this very case, the court hesitated until the last day of the session upon the effect of their division of opinion. They were also oppressed with a mass of other business. And so the wrong order was issued—instead of disposing of the case by a continuance, they got rid of it effectually by hanging the plaintiff.

It is submitted, that after solemn argument of the point, and in the face of the assembled profession, such an error could not have been committed. We hope that next winter the discussion in bank will be generally oral, and argument on brief only the exception.

NOTE. In consequence of this division in the court, the Governor has commuted the sentence to imprisonment in the penitentiary for life.—[ED.]

CRIMINAL LAW.

[Court of Common Pleas, Greene County, Ohio, September Term, 1843.]

THE STATE OF OHIO V. THOMAS TOWNSLEY.

[Reported by J. C. SABIN.]

Held, That voting for a justice of the peace, out of one's township, is not punishable under the statute of Ohio.

At the above term of said court an indictment was found against Thomas Townsley, for voting for a justice of the peace, in a different township from that in which he had his residence, which was supposed to be a violation of the law regulating elections in the state of Ohio.

The prosecution was conducted by *R. F. Howard*, Prosecuting Attorney, and the defense by *A. Harlan* and *I. G. Gest*.

In the defense it was contended by counsel, 1st. That Townsley was ignorant of the law, and therefore should be acquitted, because ignorance of the commission of an act which is only *malum prohibitum*, is an excuse for such act: and the rule of law, which relates to the commission of acts *mala in se*, in which ignorance is no excuse, does not apply to an act like the present. 2d. That a justice of the peace is not named in the statute, as either a township or county officer; hence it was no violation of the law for Townsley to vote out of his own proper township for a justice of the peace.

VANCE, J., in his charge to the jury, sustained both these points, and Townsley was acquitted.

CRIMINAL LAW—JUROR.

271

[Court of Common Pleas, Hamilton County, Ohio, January Term, 1844.]

THE STATE OF OHIO V. JOHN DOUGHERTY.

[Reported by the EDITOR.]

Held, That in a criminal case, after the jury had retired under charge of an officer, the fact that one juror separated from the rest, and went to a coffee-house, and drank spirituous liquor, without leave, is not of itself sufficient ground for setting aside the verdict; though it is an impropriety, for which the juror ought to be punished.

The prisoner was indicted for having a counterfeit bank note in his possession knowing it to be such, with the intention of passing it. The jury returned a verdict of guilty, with a recommendation to mercy.

T. Walker and *D. A. Piatt*, for the prisoner moved for a new trial, for this, among other reasons; that one of the jurors, after the charge of the court, without leave, went to a coffee-house and drank liquor, before going to the room. The fact of drinking was found beyond reasonable doubt; but it did not appear, that the juror drank so much as to affect his mind. It was, however, contended, that the mere fact of drinking spirituous liquor, during a trial, was sufficient to avoid a verdict; and the following authorities were relied upon.

Sargent v. The State (11 Ohio, 472), where the court say, "in no case can the jury, after they have retired to consider of their verdict, be permitted to separate and disperse, until they have agreed."

Smith v. Thompson (1 Cowen, 221), where in a civil case, the mere fact of separation, without leave, there being no other impropriety, is not sufficient ground for a new trial. 272

Commonwealth v. McCaul (Virginia Cases, 271), cited in an elaborate note to the preceding case (page 235), where it is held, that in a criminal case, the mere fact of unauthorized separation, without any other impropriety, is sufficient ground for a new trial.

People v. Douglas (4 Cowen, 26), where it is held, that if during a criminal trial, and before the argument, two jurors separate from the rest, and drink spirituous liquor, though not enough to affect them in the least, the verdict must be set aside, on that ground alone.

Brant v. Fowler (7 Cowen, 562), where the same doctrine is held applicable to civil cases.

Commonwealth v. Roby (12 Pick., 496), where it was held in a criminal case, in which the officer, during the trial, had been instructed to furnish the jury with reasonable refreshments; and the jury, after agreeing upon their verdict, during the recess of the court, and without special leave, had, at their request, been furnished by the officer with crackers, cheese, and cider, without separating; that this was not ground for a new trial. But the court intimated, that the case would have been different, if spirituous liquors had been furnished.

United States v. Gibert (2 Sumner, 19), where it was held by STORY, J. (page 83), that the drinking of a glass of brandy and water, by one of the jurors, on account of illness, with leave of the court, and the assent of counsel on both sides, is not ground for a new trial.

C. H. Brough, Prosecuting Attorney, *contra*, cited *Wilson v. Abrahams* (1 Hill, 207), where it was held, in a civil case, in which the jurors

were allowed to separate before the evidence was closed, and one of them drank some brandy, at his own expense, and not to excess, that this was not a sufficient reason for granting a new trial. In this case the court questioned the correctness of the decision in *Brant v. Fowler*.

BY THE COURT, CALDWELL, P. J. It is admitted, that mere separation without leave, though a great irregularity, subjecting the juror to punishment for contempt, is not of itself sufficient ground for setting aside the verdict. The additional fact, supposing it sufficiently proved, of drinking spirituous liquor, without any proof of excess or other impropriety, was held, in the case of the *People v. Douglas*, sufficient reason for granting a new trial. And this opinion was reiterated in *Brant v. Fowler*, which was a civil case. But in *Wilson v. Abrahams*, which is a more recent decision by the same court, these cases are seriously questioned, if not overruled. Our practice in regard to jurors, has not been as strict, as appears to prevail elsewhere; nor is the modern practice as rigid as the ancient. It is undoubtedly of the first importance to preserve the purity of jury trials; and the present is a proper case for punishing the juror; but not, we think, for setting aside the verdict. And as we are satisfied of the justice of the verdict, on the merits, and as it does not appear, that the prisoner was injured by the misconduct of the juror, we overrule the first motion.

273 The prisoner was then sentenced for five years; and a bill of exceptions was taken, for the purpose of applying for a writ of error, which has since been allowed.

CRIMINAL LAW.

[Court of Common Pleas, Hamilton County, Ohio, January Term, 1844.]

THE STATE OF OHIO V. JOHN M. POWELL.

[Reported by W. M. CORRY.]

Murder—Manslaughter—Self-defense—Effect of Intoxication.

The defendant in this case was charged with murdering John P. Speidel, at Cincinnati. The indictment contained two counts for murder in the second degree. The substance of the testimony appears from the bill of exceptions, under the hands and seals of the court, which is as follows:

"Be it remembered, that on the trial of this cause it was proved, that on the first day of January, 1844, at about 3 o'clock in the morning, the prisoner was walking down Walnut street, Cincinnati, with a party of young men, and between Columbia and Pearl streets was overtaken by the deceased, with another party of young men. Both parties had been larking about the streets, and the prisoner and the deceased were both intoxicated. As Speidel's party passed Powell's party, Snell, one of the former, rattled a jawbone which he had in his hand, having taken it from some negroes a few minutes before. Thereupon Harrison, one of Powell's party, told Snell to give him the jawbone; Snell refused; Harrison then caught hold of Snell by the throat, and raised his cane; there was a scuffle between them for the jawbone, during which, Harrison handed his cane to Andrew Hinde; Snell observed, "I am only a boy, and you

count yourself a man, and I don't want to fight you, nor have any fuss." Harrison replied, "If you are a boy, I won't touch you; I won't fight a boy," and let Snell go with the jawbone. During the scuffle, the prisoner stood with a club over his right shoulder, five steps off, saying, "I will show (or see) fair play." Both his hands were on the club, which was a hickory stick, about three and a half feet long, and a large heavy club. After, or about the time the scuffle was over, between Snell and Harrison, the deceased (who had taken Snell's club, of over two feet long, out of his hand when he got the negroes' jawbone), came quickly up to the prisoner, with the club in his right hand, and the end down on the ground, and the following dialogue ensued:

Deceased—"I don't think it is right for men to interfere with boys, to whip them, and to take their things from them."

Prisoner—"Hold your jaw; I can whip the crowd."

Deceased—"You can't do it; you can't whip me any how."

274

Prisoner—"Yes I can."

Deceased—"No you wont."

Prisoner—"Yes I will, damn you." Prisoner then struck the blow, and immediately said, that he "would permit no boy to tell him to kiss his arse."

"The prisoner struck the deceased one blow, on the left side of the head, with his club. The prisoner raised the club from his shoulder in both hands, but did not move from his tracks, nor draw back, nor swing the club, nor repeat the blow. There was light enough to see objects at the distance of several feet. At the time of the blow, Speidel stood very close to the prisoner, with his club still grasped in his right hand, but the end on the pavement. He immediately fell, on receiving the blow, but was soon assisted to rise, and walked away with his friends, two or three squares, to the corner of Sycamore and Front streets, where he sat down and vomited. He walked thence, assisted by two of his friends, three squares further, up the hill to the corner of Sycamore and Fourth streets, but was unable to proceed further, and was carried home. On his way to the corner of Sycamore and Front streets, Snell asked deceased, whether he was much hurt? To which he replied, "he was not." Snell also told him, to walk faster, which he did.

"Deceased died about twelve hours after the blow, in consequence of compression of the brain, produced by the effusion of blood from a ruptured artery, within the cranium. About an hour before his death, he was trepanned, by Dr. Mussey."

The counsel for the prisoner, *W. M. Corry* and *T. Walker*, required the court to charge the jury as follows:

1. That in order to constitute murder in the second degree, there must be an actual, and not a mere constructive, intention to kill.

2. That for the purpose of determining, whether the prisoner intended to kill the deceased, the jury have a right to consider, whether the prisoner was intoxicated at the time when he inflicted the blow.

3. That if the deceased, having first procured a bludgeon, went up to the prisoner, who stood aside, and grossly insulted and defied him, so as to give the prisoner reason to apprehend, that deceased intended, and was about to attack him, and in order to prevent such attack, prisoner struck the blow that resulted in death, but without intending to kill, then the prisoner is not guilty of manslaughter.

4. That upon an indictment for murder in the second degree, the prisoner may be convicted of assault and battery.

The court, the Hon. W. B. CALDWELL, presiding, charged the jury, 1st. That to constitute murder in the second degree, there must be an actual intention to kill. 2d. That the intoxication of the prisoner could not be taken into consideration by the jury, for the purpose of determining whether the prisoner was actuated by malice; nor for the purpose of 276 determining whether he intended to kill the deceased. 3d. That the jury might convict the prisoner of a common assault and battery, if the blow inflicted by him, upon the deceased, was not the cause of death.

The court refused to charge the jury as required by prisoner's counsel on the third point. The bill of exceptions shows, that they "instructed the jury, that if the prisoner brought on the altercation with the deceased, by his own violent and abusive language towards him, and was thus the aggressor himself, that circumstance would make a difference. And, that if the prisoner, even if he apprehended an immediate attack from the deceased, in the manner contended for by his counsel, had yet used such degree of violence with his club, upon the person of the deceased, as to cause his death, the prisoner might not be justified in using such violence; but that the slayer might be guilty of an unlawful killing, within the meaning of the statute; that it would depend on the circumstances of the case." With these qualifications, the court charged as required.

The jury found the prisoner guilty of manslaughter, and recommended him to the mercy of the court. The prisoner was sentenced to be imprisoned in the penitentiary for four years.

No writ of error was applied for on the bill of exceptions, the governor having, in accordance with a petition signed by the jury and several citizens, commuted the sentence to two months imprisonment in the county jail.

REPORTER'S NOTE. The ground upon which a writ of error was to have been applied for on the bill of exceptions, was, that the court erred in instructing the jury, "that if the prisoner had brought on the altercation with the deceased by his own violent and abusive language towards him, and was thus the aggressor himself, that circumstance would make a difference." It was conceived by the prisoner's counsel, that if the prisoner had reason to apprehend, that deceased intended, and was about to attack him with a club, the prisoner was not bound to wait and receive the blow before using his own club, merely on account of his having uttered the first provoking words, which could not have justified an assault.

With regard to the ruling of the court on the second point, it became immaterial, in consequence of the verdict of the jury; but it may be as well to call attention to the case of *Rev v. Meakin* (7 Ctr. and Payne, 297); 32 Eng. Com. Law Rep., 514), which was an indictment for stabbing with intent to murder. Alderson, Baron, in addressing the jury, said, "If a man use a stick, you would not infer a malicious intent, so strongly against him, if *drunk*, when he made an intemperate use of it, as you would if he had used a different kind of weapon." And see the case of *The State of Ohio v. Andrew Walton*, (*ante*, page 256).

This was no doubt a case of unintentional killing, and presents the occasion for one word on the amendment of our law of manslaughter. That law, with us, has two branches, but the punishment for both is the 276 same. If A. kill B. in a sudden quarrel, intentionally, he may be sent to the penitentiary for ten years; it is so if A. kill B. unintentionally, when A. is doing anything contrary to law. For example, it is a trespass which the law forbids, to go into a farmer's enclosure without

leave. Now hundreds of such breaches of law are committed every fine day, in the shooting season, by sportsmen in quest of birds. And if two friends should thus be ranging opposite sides of the field, and by firing at the game, one is killed, this would be manslaughter, punishable with not less than one year's imprisonment in the penitentiary. The crime of manslaughter varies widely in culpability; and in England the punishment ranges from transportation for life, down to a nominal fine. If one causes the death of another by negligence, it would be manslaughter at common law; and it ought to be made so by our legislature; but the court should not be bound, under all circumstances, to sentence the offender to a year's imprisonment in the penitentiary. A power to inflict a fine, and to imprison in the county jail, should be given.

It may be as well here also, to observe, that violent assaults and batteries should be made punishable more severely. At present the criminal cannot be sent to jail for more than ten days, even though he has beaten a man almost to death, without the slightest provocation.

It is the duty of the legislature to remedy these defects without delay.

AMERCEMENT.

305

[Court of Common Pleas, Sandusky County, Ohio, November Term, 1843.]

THE STATE OF OHIO V. SAMUEL CROWELL.

[Reported by O. BOWEN, President Judge of the Second Circuit.]

The liability of a sheriff to amercement continues after the expiration of his office. A motion to amerce is not within the statute of limitations.

A sheriff is not liable to amercement for neglecting or refusing to pay over a fine collected by him on execution.

This was a motion to amerce defendant, late sheriff of Sandusky county.

At the March term, 1832, of this court, there was assessed against George Jones a fine of five dollars, and costs to the amount of twenty-nine dollars, thirty-three cents, for the collection of which a *ca. sa.* was issued by the clerk in March, 1833, and delivered to Crowell, who was then sheriff of this county. On the 29th of April, 1833, the sheriff indorsed that he had received of "Jones twenty dollars and five cents in cash and orders, and ten dollars in addition, to be paid by R. Dickerson, that being the amount due on the execution; it is therefore returned *satisfied.*" It was admitted that this sum of ten dollars was afterwards demanded of Crowell, and not paid over by him on such demand.

The notice to Crowell assigns for cause of amercement, "having neglected and refused to pay over the money, according to law, on demand of the persons legally entitled to demand, have, and receive the same, on behalf of the state." Crowell's term of office expired before the filing of this motion.

L. B. Otis, for the state, insisted that the above facts authorized a judgment against the defendant.

C. K. Watson, for defendant, argued the following points:

1. No judgment of amercement can be rendered against a delinquent *after* his term of office has expired.

2. The proceeding is barred in analogy to the statute of limitation.

3. The defendant is not liable to amercement for the amount collected in orders, nor for the amount to be paid by Dickerson, but only for the sum received by him in *cash*.

BOWEN, P. J.. The *official* delinquency of the officer is the foundation for this summary proceeding. It has been introduced into and authorized by our laws as a mode of *punishment* for certain acts of misconduct which are defined. It has been supposed to be the most adequate remedy to the injured party for those peculiar wrongs, and in practice it has not been found more arbitrary and penal than occasions frequently justify. The right thus to proceed against the defendant accrued **306** while he was in the execution of his office. From that time the plaintiff was at liberty to use this remedy if he chose, and was entitled to it. The statute does not make the exercise of it dependent on the continuance of the defendant in office. It does not, in terms, declare when the proceeding shall commence. As, however, the *forfeiture* attaches and affixes itself to the defendant, it must remain so until discharged by something besides the expiration of his official functions. His retirement from office cannot absolve him from liabilities incurred while in office. He must still answer for them according to the law under which they were incurred. This, we incline to think, is a proper construction of the statute.

Is the proceeding barred by the statute of limitations? It is about ten years since the alleged liability of the defendant arose. An action against an officer for malfeasance or nonfeasance in office is barred in one year. An action upon his bond is barred in fifteen years: "When any action for a forfeiture or penalty is given, and limited by statute, the action shall be commenced within the time so limited. All *actions*, not enumerated in the statute, are barred in four years." Statute, pp. 554, 555. This case does not come within any of the foregoing provisions. The law is silent as to the time when the liability shall terminate. No time is indicated in which the motion must be made. It may well be inferred that the legislature intended the remedy to continue *ad infinitum*. When crimes, offenses, or misdemeanors are not expressly barred, the offender continues, to the latest time, subject to indictment. But the rule should not, probably apply with the same rigor to a forfeiture imposed for misconduct in office, not indictable, to be responded to in *money* only. Presumption of payment follows the lapse of time. Twenty years is said to raise that presumption, and sometimes it arises in a less number of years; as where the creditor and debtor have lived in the same neighborhood, have had other dealings and settlements thereof between them, or when such other circumstances attend the lapse of time as raise a natural and fair presumption that payment has been made. Such a presumption does not, as we think, arise in this case. The money detained by the sheriff belonged to the county. It was not the *interest* nor the *duty* of any individual specially to demand it of him. The inference is strong that he has withheld it from the county treasury of his own wrong, and if he would rely upon a defense of payment, he should introduce proof of it. *Gaither v. Slaughter*, 1 Dana's Ky. Rep., 369.

That clause of the statute on which the plaintiff relies, as authority for making this motion, and the rendering of a judgment against the defendant, is as follows: "If the sheriff shall refuse, or neglect, on demand, to pay over to the plaintiff, his agent or attorney of record, all moneys, by him collected or received, for the use of said party, at any

time after collecting or receiving the same, etc., he shall, on motion, in open court, and two days' notice thereof, in writing, to be given him by the plaintiff, or his attorney, be amerced in the amount of said *debt, damages*, or costs, with ten per cent penalty thereupon, to and for the use of said plaintiff."

This is a part of the thirty-first section of the "act regulating judgments and executions." Our courts have, uniformly treated this 307 as a highly penal statute, and have given to it the most strict construction. It has never been extended to any case not within its letter. If additional legislation is necessary in the premises, the general assembly has the power to, and will, doubtless, adopt it. For the present we must be governed by the law now in force.

We are naturally led to the inquiry, what is implied in the terms used in the foregoing quotation we have read from the statute? Do not the words, *plaintiff, his agent or attorney, debt, damages, etc.*, have reference to claims of individuals? Has not the whole act reference to judgments in civil causes? A *fine* is amends, pecuniary punishment, or recompense for an offense committed against the state. Tom. Law Dic., vol. 1, p. 796.

The execution required the officer to arrest Jones, and have him before the next court of common pleas to "render unto the state the sum of five dollars *fine*, with *legal interest*." It informs us that the fine was imposed by the court of common pleas, and that a jury fee comprises one of the items of costs. We have no evidence before us under which of the penal statutes this order of the court was made, nor is it important we should have such proof. We are warranted in the conclusion that it was a proceeding by indictment.

All fines and penalties, collected by indictment, are required to be paid by the officer receiving them, into the county treasury, for the use of the public. He is made, for that purpose, the agent of the public, and there is no person clothed with authority, by any express provision of statute, to make a *demand* of him for collections so made.

There must be a refusal, on demand made by the plaintiff, his agent or attorney, to pay over the money held by the officer. The treasurer's duty requires him to receive and receipt for the money, but he is not empowered, nor is it his duty to make a demand, or any special request of the officer for it.

The act regulating sales at auction, which was in force at the date of imposing this fine, creates several offenses, for the commission of any one of which a party is liable to be indicted and fined. The execution against Jones, under which this motion was made, may have issued for a fine assessed under that statute. It is not unreasonable to conclude that it was for an infraction of that act. It may as well have been for that, as for any other offense. We are unadvised however, as to the fact in this respect; but for the present will assume it to be so.

The twelfth section of the act provides, "that it shall be the duty of the sheriff, or other officer, who shall collect or receive any *fine* or penalty, imposed under the provisions of this act, to pay the same to the treasurer of the proper county, within ten days after receiving it." The thirtieth section declares, that "if any *sheriff* shall neglect to perform the duties required by this act, he shall *forfeit* and *pay* to the state of Ohio, the sum of one hundred dollars over and above the amount of money which ought to have been paid over by such sheriff."

308 There is no duty cast upon the sheriff to receive money, nor is he an agent to do so, in any form, except upon execution. If, after making a collection upon his writ, he fails, for ten days, to pay it over to the county treasurer, he forfeits, and is liable to pay a penalty of one hundred dollars. The infliction of so heavy a forfeiture, for the nonpayment of five dollars, would seem to be amply sufficient, without recourse to any other proceeding. Here the duty of the sheriff is plainly defined and the penalty for a breach of it affixed. Shall he be twice punished for the same thing? Or is this clause of the act nugatory, and was it intended, by the statute authorizing amercements to be rendered in certain cases, to supersede and repeal this clause? The two, when applied to cases for which they were framed, are not inconsistent. Each in its place serves the object for which it was designed, and cannot be used for any other purpose. In all cases where an act creating an offense, also declares what penalty shall follow its commission, the party found guilty must be punished under its provisions, and is not amenable in any other form. This view of the subject illustrates most forcibly, the propriety of giving to penal statutes a strict construction. The case made by the plaintiff's motion would seem to bring the defendant within the *spirit* of the amercement act; and yet, were we to extend it thus far, and render the judgment that is asked for, we might visit the defendant with a penalty for an offense for which he had already suffered, or might be liable to suffer under another form. When the legislature tells us how far we may go, our duty is performed when we arrive at that point. If we advance further, we act without authority, and are in danger of working serious mischief to the party. This, also, tends to show that the thirty-first section of the act to regulate judgments and executions was intended only to apply to civil causes. A clear distinction is kept up between fines and judgments. The duty of the sheriff, in regard to each, under his writ of execution, is in some respects different. Money made on a judgment, he is bound to pay to the plaintiff, his agent or attorney, on *demand*. Money made on an execution for a fine, he is bound, within a specified number of days, to pay into the county treasury. For failing to do the former, he may be *amerced* in the amount of the *debt*, or damages, and costs, with ten per cent penalty. For failing to do the latter, he incurs a penalty which may be collected by indictment. No other reason for this distinction is apparent than, that in the one case he acts for an individual, and in the other for the public. Their rights being different, they have different remedies.

If it be said that the act, relating to auctions, is dissimilar, in respect to the penalty, to all the other penal laws in the statute book, the answer must be, that it can make no difference if it be so. Each of the acts for the punishment of offenses—the regulating of elections—the prevention of gaming—and the licensing of taverns, contains a provision, that the fines therein provided for, when collected, shall be paid into the county treasury. There is no penalty, in any of them, for a failure, by the sheriff, to make such payment.

309 In the "act defining the duties of sheriffs and coroners, in certain cases," which took effect in 1824, is contained the following provision: "If any sheriff shall refuse or neglect to perform the duties which, by law, he may be required to perform, he shall, upon conviction thereof, be fined in any sum not exceeding four thousand dollars, at the discretion of the court, to be recovered by indictment, to and for the use of the county in which the offense shall have been committed; provided

that the provisions herein contained shall not extend to affect any remedy which might otherwise be had against any sheriff for an escape or neglect, upon civil process." Statute, p. 858, latter clause of 4th section. This enactment reaches every case of a refusal or neglect, by the sheriff, to perform such duties as the law exacts at his hands, not otherwise provided for. It was deemed the appropriate penalty in such cases. In the numerous instances in which the officer is, by different statutes, required to act, where it has not seemed advisable to prescribe specially a penalty clause, individuals, as well as the public, are left to seek redress under this section; and it would seem, in such cases, as it was, doubtless, intended to be, an ample shield against official dereliction of duty. But if this section cannot be construed to apply to the case in hand; if it do not relate to the non-payment of fines, when collected by the sheriff, into the county treasury, and afford, for such omission, a proper punishment, then the officer is placed under no other obligation than are imposed by his bond and oath of office, as regards his duty under those acts.

The law prescribing the duty of county treasurers, enacts, that if any county treasurer shall fail to make return, fail to make settlement, or fail to pay over all money with which he may stand charged, at the time and in the manner prescribed by law, suit may be brought on his bond, and judgment rendered at the first term for the amount due, and for ten per cent penalty, from which there shall be no appeal, nor stay of execution, and the property of the treasurer and his sureties be sold without appraisal. The next section requires the sheriff to pay any money, by him collected on such judgment, in ten days into the county treasury. The twenty-eighth section of the same act then declares, that if any sheriff, to whom an execution against a delinquent treasurer and his sureties, shall *neglect or refuse to pay over any money* collected thereon, as required by the preceding section, he and his sureties shall be liable to the same penalties, and shall be proceeded against in the same manner, as against delinquent treasurers. This act, and the amercement act, took effect and became laws at the same time. Is it probable, that if the legislature had aimed to extend the latter to the collection of fines and other public dues, that this provision would have been incorporated into this act? The two are nearly alike. The penalty is the same. It shows, to my mind, that this was a case in the opinion of the Legislature, where a penalty, in favor of the public, should be inflicted on the sheriff for his neglect of duty, and it was, accordingly, introduced into the act. It is a plain concession that no similar proceeding was authorized against the officer by any other law. It is a denial of any authority, now claimed by the plaintiff, to hold the defendant amenable, on the motion of the state, under the statute of amercements; and hence the necessity of incorporating such a provision to guard, more effectually, the rights of the public 310

Upon a motion to amerce, for the non-payment of a fine collected by the sheriff, the court cannot discriminate under what act the fine was imposed. The amercement act makes no exception. The term *fine* is not enumerated therein. It was not intended by the legislature to be included in that act. The public sought no such remedy against its officer. It was passed for the benefit of individuals. Whenever the penalties under the several laws now in force, prove insufficient for the faithful discharge of the duties of public officers, entrusted with the collection and payment of fines, we have confidence that the law making power will further legislate on the subject. However desirable it might be, in

some cases, not falling within the statute, to use this summary means to enforce fidelity and promptness on the part of the officers, yet we cannot permit it to be pursued, till the right of so doing is secured by law. The motion is overruled.

NEGOTIABLE INSTRUMENTS.

[Court of Common Pleas, Licking County, Ohio.]

AVERY, FOR USE OF SAWYER, V. LATIMER AND FELL.

[Reported by L. CASE.]

Held, That under the statute of Ohio respecting negotiable instruments, the legal title to a sealed bill, made payable to bearer, can only pass by indorsement.

Whether such a bill can be offered in evidence under the money counts, *quære*.

This was an action of debt, brought on a sealed promissory note of defendants, made payable to Avery, or *bearer*. The declaration contained a special count on the note, and the common money counts. To the common counts defendants pleaded *nil debet*—to the special count they pleaded *non est factum*, and a special plea setting forth, that the plaintiff, Avery, before the commencement of this suit, *sold and delivered* (without indorsement) said note to said Sawyer, who in pursuance thereof, held and owned the same at the time of the commencement of this suit; to which plea the plaintiff demurred generally, in which the defendants joined.

L. Case, for defendants, contended, that the note being payable to *bearer*, was negotiated by the sale and delivery, without an indorsement, whereby the legal title to the same was vested in Sawyer, who alone could sue; and that Avery had no interest either legal or equitable.

311 *W. Stanbery, Jr., contra*, contended, that the action was properly brought under our statute, which provides, "that notes, etc., payable to order, *bearer*, or assigns, shall be negotiated by *indorsement thereon*," etc., that inasmuch as the note had not been indorsed by Avery, the legal title yet remained in him.

L. Case, in reply, argued, that such a construction of our statute was too rigid; and that the result of it would be, that a note payable to order, and *indorsed* by the payee, would have to be *indorsed* at every subsequent transfer, in order to pass the legal title; as that is claimed to pass only by indorsement. It would also be necessary that every bank bill payable to *bearer*, should be indorsed at every transfer to pass the legal title.

SEARLE, P. J. At common law, the note declared on in this case, being a chose in action, was not negotiable. Under our statute such notes are made negotiable by *indorsement thereon*. This note never having been indorsed, the legal title remains in Avery, and the action is rightly conceived. Demurrer sustained.

The case goes to the supreme court by appeal.

NOTE. During the trial of the above case, the plaintiff offered the note in evidence under the special count, but there being a mis-description of it, the court rejected it. The plaintiff then offered it in evidence under the common money counts; but the defendants objected, that a specialty could not go in evidence under the common counts, to which the proper plea was *nil debet*; but that it was referable to an issue raised

by the plea of *non est factum*. The plaintiff however claimed that it was an evidence of money had and received, etc. The court intimated an opinion, that a specialty could not go in evidence under the issue raised on the common counts; whereupon plaintiff had leave to amend.

ASSAULT AND BATTERY—LICENSE TO COMMIT— EVIDENCE.

319

[Superior Court of Cincinnati, January Term, 1844.]

JOHN SCHUTTER V. WILLIAM L. WILLIAMS.

[Reported by W. VAN HAMM.]

A license to commit an assault and battery is not a bar to the action of trespass. The license may be given in evidence in mitigation of damages.

Where the plaintiff is unable to speak the English language, and the defendant, is unable to speak the German language, and the wife of the plaintiff understands both languages, and acts as interpreter between the plaintiff and defendant, the statements of the wife, made at the time, may be given in evidence as admissions of the husband.

The amount of damages in an action for an assault and battery depends on a fair examination, by the jury, of all the circumstances surrounding the case.

This was an action of trespass, for an assault and battery. The defendant pleaded the general issue, and gave notice of a license in bar of said action. Before the jury was sworn, a motion was made by the plaintiff's attorneys to strike the notice from the files, for the reason, that the matters therein contained did not constitute a bar to the action. Swan's Stat. 661; 5 Ohio Rep. 169, 340; Oliver's Precedents, 466; 1 Hawks., 420. It was argued, on the part of the plaintiff, that a license to commit an assault and battery was a license to do an *unlawful act*, and consequently no bar;—that the defendant was not released from liability, because he had committed an outrage against the laws of the land; and that his having done so by consent of the plaintiff was no justification. The defendant's counsel urged upon the court, that the beating was not an unlawful assault and battery, because it was done by the permission and consent of the plaintiff.

ESTRE, J., sustained the position taken by the plaintiff's counsel, but permitted the matters set up in the notice to be given in evidence in mitigation of damages.

It was proved on the part of the plaintiff, that the defendant gave the plaintiff twenty-five lashes, with a whip, on the back. The defendant then offered evidence of a conversation between the plaintiff and the defendant, and the plaintiff's wife (the plaintiff not being able to speak the English language, and the defendant not being able to speak the German language, the wife of the plaintiff understanding both languages, and acting as interpreter between them), tending to prove an agreement between the plaintiff and the defendant, by which agreement it was stipulated that the plaintiff was to receive from the defendant twenty-five lashes. 320

Counsel for the plaintiff objected to the statements of the wife being given in evidence as the admissions of the plaintiff, and was about to give the following reasons for the objection :

1. That the admissions of the wife were not evidence against the husband.

2. That she may, either intentionally or unintentionally, have misinterpreted the words of her husband, and of this the court could only judge by hearing her statements under oath.

3. That she was not sworn, nor could be without the permission of the defendant, to state truly the conversation between the parties.

4. That if the witness, and the only witness to the conversation between the parties, had been any other person than the wife of the plaintiff, it would have been the duty of the defendant to have brought said witness into court to testify, under oath, as to the statements and admissions of the plaintiff.

5. That the testimony given to the jury, by one of the witnesses, as to the statements and admissions of the wife, was nothing more than hearsay testimony—that it was to this effect, “the wife said, that the husband said,” (the witness who gave these statements not understanding German language).

The court was unwilling to hear the reasons for the objection, and told the witness to go on, saying, that “nothing should be kept back.”

It was then proved, that defendant charged plaintiff with stealing a pitchfork, which was taken from the defendant's premises about one month before the time of the conversation alluded to. The wife of the plaintiff denied that her husband had ever stolen the fork. The defendant insisted upon it that he had, and said that the plaintiff must either go to the chain-gang for six or seven months, or take a whipping of twenty-five lashes from him, for so doing. Whereupon the wife said that her husband would rather take twenty-five lashes than go to the chain-gang. This conversation occurred about one hundred yards from the defendant's house. The parties then all proceeded to the defendant's house, and the defendant laid on the twenty-five lashes pretty severely, after having taken off his own coat, and told the plaintiff to take off his coat too, which the plaintiff did. The old man's back was terribly bruised—being black, blue, and green, for ten days after the whipping; and there were ridges on his back as large as one's finger.

A fork, which one of the witnesses testified was the defendant's fork, was found in the possession of the plaintiff. When interrogated about it, he said he had found it on the road to Warsaw, and insisted upon it that he had not stolen it.

321 ESTE, J., charged the jury, that they must be satisfied that an assault and battery was committed by the defendant upon the plaintiff, before they could bring in a verdict for the plaintiff. That if they were so satisfied, they must examine whether there were any mitigating circumstances, and bring in a verdict accordingly. That the mitigating circumstances would depend in a great degree upon whether the jury believed, that the defendant told the plaintiff, that the law was, that he must either go to the chain-gang or take a whipping, as testified by one witness; or whether he said, that according to law he must go to the chain-gang, or if he preferred it, he would whip him, as testified by another witness.

Verdict for plaintiff, one hundred dollars.

W. & A. Van Hamm, for Plaintiff.

Cary & Telford, for Defendant.

USURY.

[Superior Court of Cincinnati, January Term, 1844.]

**THE LAFAYETTE BANK OF CINCINNATI V. SAMUEL B. FINDLAY AND
GEORGE P. TORRENCE.**

[Reported by E. S. HAINES.]

The taking of interest in advance upon the discount of a note in the usual course of business by a bank is not usury.

The taking of interest for ninety-nine days inclusive, on a ninety-five day note, is not usury.

Taking interest for a portion of a year, computed on the principle that a year consists of three hundred and sixty days, is not usurious, provided this rule is adopted for convenience, and there was no intent to violate the charter in taking more than six per centum per annum.

This was a joint action under the statute, upon two promissory notes held and discounted by the plaintiff.

The defendants, under the general issue, resisted the right to a recovery upon the following grounds among others:

1. That interest was computed on the face of the notes, instead of the amount loaned.

2. That the bank charged ninety-nine days interest on the two notes drawn at ninety-five days.

3. That the computation of interest was in the proportion of three hundred and sixty days to the year.

Some other reasons of minor importance were urged; and all for the purpose of showing a charge of usurious interest—that the bank had exceeded the powers conferred by her charter, and therefore, that the notes were void. 322

The testimony was in substance this: That the notes were drawn payable at ninety-five days, and the bank charged ninety-nine days interest, in advance, computed upon the standard of Rowlett's Tables; that these notes had been renewed seven times, being partially reduced at each renewal.

It was proved by the plaintiffs that all the banks in Cincinnati, in discounting notes, had adopted the rule of charging interest in advance, upon the entire sum, for the number of days from the day of discount inclusive, to maturity, upon the principle or standard of computation of Rowlett's Tables. That this rule of computation was adopted generally by the banks in the states of Pennsylvania, Maryland, Kentucky and Louisiana, and that the only exception known was in New York. That the board of the Lafayette bank had never given any directions as to the mode of computing interest on discounted notes, believing that six per cent. had been charged in all cases, and no more. That Rowlett's Tables have been adopted as a test or standard of computation, for convenience and not for the purpose of evading any limitation in the charter.

After a full argument, upon submission, the court (Judge ESTE) decided,

1. That it was not usurious to deduct interest from the amount of the note or bill at the time of its purchase. That *ex vi termini* the power to discount bills or notes, conferred by the charter, gave the right

to charge interest on the face of the note, and that it was hardly necessary to consider this question, but that it was fully settled in 2 Cowen, 664; 8 Peters, 354; 12 Pick., 589.

2. That ninety-nine days' interest on a ninety-five day note does not give more than six per centum, per annum, as the parties actually had the use of the money during the entire time, on the days of discount and payment. This question was considered and settled in 3 Peters, 40, 41.

3. As to the computation of interest, at thirty days to the month, the court was of the opinion, that as the charter of the Lafayette bank conferred the power of discounting bills and notes upon banking principles and usages, evidence could be introduced to prove those usages. From that testimony it appeared that computations by Rowlett's Tables were in accordance with the usages of banks. That in this instance there was no intention to exceed the legal rate of interest, but that the object was to arrive at uniformity and accuracy of calculation and the avoidance of fractions. The true question was, whether any device was resorted to for the purpose of disguising and covering an intention to evade the charter by taking more than six per centum. This same question was presented in 12 Pick., 586, and decided not to be usurious.

323 Under the circumstances, the court is satisfied that the plaintiffs have acted in good faith, and have not exceeded the powers granted by their charter.

Judgment for plaintiffs.

E. S. Haines, for Plaintiffs.

Chase and Ball, for Defendants.

333

WATERCRAFT.

[Court of Common Pleas, Hamilton County, Ohio.]

ALFRED HUNT V. WILLIAM HOLMES.

[Reported by J. L. MINER.]

A person injured by collision between two steamboats is entitled to recover for such injury from the party whose boat was in fault.

If the collision was the mutual fault of both boats, the person injured is entitled to recover from the owner of either.

This was an action on the case, tried in May last. The plaintiff was steward on the steamboat *Monarch*, and the defendant part owner of the steamboat *Georgia*. In May, 1839, the above boats came in collision on the Ohio river, above Wilkinsonville bar, by which the cook-house of the *Monarch* was demolished and her escape-pipe, which passed through the cook-house, broken, and the plaintiff badly burned by the steam. For this injury the suit was brought. The testimony of the pilot, engineer, and clerk, on each boat, was taken, by which it appeared that the collision occurred about 11 o'clock at night, near the middle of the river, the *Georgia* descending—the *Monarch* ascending; that the boats came together nearly at right angles, the bow of the *Georgia* striking the

larboard side of the *Monarch*, aft her cylinder timbers. There was no moon, and some clouds and mist. Both boats made exertions to prevent the collision, after the danger became imminent. The testimony as to which boat was in fault, was contradictory and very equally balanced.

Storer & Ridgely, for Plaintiff.

Wright, Coffin & Miner, for Defendant.

CALDWELL, J., charged the jury, in substance, that if the collision was occasioned by the negligence of those navigating the steamboat *Georgia*, and the plaintiff was injured by such collision, he was entitled to recover; or that if they found that the injury was occasioned by the fault of both boats, the plaintiff was entitled to recover. That the case differed from that where the owner of one boat sought to recover from the owner of another, for an injury resulting to a boat from a collision. In such case, if the injury resulted from the misconduct of both boats, neither party could recover.

In this case the plaintiff, although employed as steward on board the steamboat *Monarch*, would not (in the absence of proof on the subject) be entitled to have any agency in the navigation of the boat, and consequently, his rights would not be affected by the conduct of those who navigated or controlled her. If both boats then were guilty of negligence, in permitting the collision to take place, they would both be liable to the plaintiff for any injury sustained by such collisions, and he might proceed against both or either, at his option.

The jury returned a verdict for the plaintiff for \$700.

MANDAMUS—EXCEPTIONS.

358

[Supreme Court of Ohio, Clermont County, April Term, 1844.]

Before LANE, C. J., and REED, J.

THE STATE EX REL. LANE V. THE JUDGES OF THE COMMON PLEAS OF CLERMONT COUNTY.

[Furnished by Judge LANE.]

Under the present practice in mandamus, the alternative writ is served in the first instance, without any previous rule to show cause.

If the judges of the common pleas refuse to sign a bill of exceptions, they must make known the cause to the parties or their counsel.

LANE, C. J. A rule has heretofore been issued, to show cause why a writ of mandamus should not be issued, commanding them to sign a bill of exceptions, etc. This was correct practice before the statute of 1835. But since that statute (*Swan's Stat.*, 689), which renders the return traversable, and provides a trial of the issue, and an ample and final remedy in that judgment, the correct practice is, to issue the alternative writ in the first instance, in a *prima facie* case, without a previous rule to show cause.

The judges of the common pleas have complied with the present rule, and shown as a reason for not signing and sealing the bill of exceptions offered to them, that it did not contain certain documentary evidence; but they aver that they would have signed it, had it contained

those documents. These reasons, alone, are not sufficient, without showing further, that those documents composed a part of the testimony upon which their own opinions rested, and which was related to the facts in the bill, and that the counsel were apprised of this cause of refusal, and had an opportunity to supply the defects of the bill.

It is not an easy thing to present a case with entire truth, by a bill of exceptions, and justice requires of both court and counsel to unite in making it correct. There are reciprocal rights and duties for both. It is the duty of the court, to carry into the record, when required, every one of their judicial acts; and it is their right to demand from counsel, that the bill of exceptions shall contain every element which the court assume as the basis of their action. If the court decline to adopt the counsel's draft, common fairness requires of them, to point out the cause of refusal, so that objections may be removed, either by an amended draft, or by the introduction of further statements.

An alternative mandamus may be issued, and it is probable the omissions will be supplied by the return.

360

CRIMINAL LAW.

[Supreme Court of Ohio, Cincinnati, April, 1844.]

JONTE, PLAINTIFF IN ERROR, V. THE STATE OF OHIO.

[Furnished by Judge WOOD.]

The fourth section of the act of March 23d, 1840, which was not repealed until March 1st, 1843, makes it penal to receive or pass any note under the denomination of five dollars, which is not issued by, and made payable at one of the incorporated banks of this state. *Held*, That in consequence of this provision, a person cannot be punished for counterfeiting, while that act was in force, a foreign bank note of a less denomination than five dollars.

WOOD, J. It appears from the record, that the plaintiff in error was indicted at the January term, 1843, of the court of common pleas. The two first counts of the indictment charge the plaintiff in error with "uttering and publishing to one David Thatcher, with intent then and there to defraud the said David Thatcher, a false, forged and counterfeit bank note of the state bank of Indiana, given for the payment of two dollars of the tenor," etc., "the said Joseph Jonte then and there well knowing the aforesaid forged bank note to be false, forged and counterfeited, contrary to the form of the statute," etc. The time laid in the indictment was December, 1842.

There is a third count which charges the plaintiff in error with attempting to pass said note to said Thatcher, with the intent aforesaid, and a fourth count, which was, however, abandoned on the trial.

The plaintiff was tried, convicted and sentenced to imprisonment in the penitentiary, and this writ is prosecuted to reverse these proceedings.

The assignments of error are founded on a bill of exceptions, taken during the trial, to the opinion of the court in refusing to charge the jury as prayed by the counsel for the plaintiff, and in the charge as given by the court.

The court was asked to charge the jury, that under the act of March 23, 1840, section 4, "the plaintiff could not be found guilty; that the note

in question was illegal, and therefore not the subject of forgery; that no person could be defrauded by a forged note, when if the note were genuine it would be illegal, and that the plaintiff in error could not be found guilty of uttering and publishing such a forged bank note." This instruction the court refused to give, but, on the contrary, charged the jury, "that genuine notes of this character were the subject of forgery, and the jury should so regard it."

Did the court of common pleas err in its refusal so to instruct the jury; or is the instruction, as actually given, the law of the case? These are questions highly important, and we have endeavored to give them deliberate and diligent attention. The conclusion to which we are forced, reluctantly forced, may, perhaps, lead to the more frequent commission of *moral* turpitude, if not *legal* crime. We must, however, administer the law as we find it, and to another forum is entrusted its reform, and to afford that protection to the community against frauds, in this class of cases, which exists in others, under the laws of this state. 361

The 22d section of the act for the punishment of crimes, (Swan, p. 233), enacts, "that if any person shall falsely make, alter, forge, or counterfeit any record," etc., "bond, bank bill, or note," etc., "or shall utter and publish, as true and genuine, any of the above named false uttered, forged, or counterfeited matters above specified, knowing the same to be false," etc., "with the intent to prejudice," etc., "every person so offending shall be deemed guilty of forgery," etc. If this were the only statute to be consulted, the result would be the affirmance of this judgment. Under its enactments, a foreign bank note is as much the subject of forgery, when *under* as when *over* the denomination of five dollars, and foreign and domestic bank notes are placed by it upon the same footing. This is the section on which the first two counts of the indictment are framed, and it is clear to us, the third count, though based upon another section of the statute, must stand or fall by the same principles applied to the former counts.

The act of March, 1840, in our opinion, limits the operation of this section, so far, that foreign bank notes, under the denomination of five dollars, are no longer the subject of forgery, if the intent be laid to defraud the *receiver* of the bill. The fourth section of this statute provides, among other things, "that it shall be unlawful for any person or persons to pass, transfer or circulate, or to receive or redeem notes, bills," etc., "calculated or intended to circulate as money or currency, of a less denomination than five dollars, unless the same shall have been issued by, and made payable at, one of the incorporated banks of this state; and every person violating the provisions of this section" is subjected to a penalty of \$10, to be recovered in an action of debt.

To pass, utter, publish, receive or redeem, a two dollar bill of the state bank of Indiana, is penal, prohibited by positive law, if the bill be genuine; but if spurious in legal contemplation, the receiver is not defrauded, for, without a violation of law, on his part, he could not take it.

It was formerly held, that if an act done was not *malum in se*, but prohibited merely under a penalty, the act was lawful, or, at least, an action might be sustained on the contract for doing it, though the penalty imposed might be exacted. Such is, however, not now the law, and I am not aware of any substantial distinction, in legal contemplation, whether the act be made unlawful by statute only, or be so in itself. The receiver of this note was not prejudiced. He knew the law. When he took it, he was guilty of an offense, and, if a true note, he could not pay it out. It

was blank paper in his hands, and though counterfeit his condition is precisely the same.

There are a number of English cases that bear a strong analogy to the one at bar, and in the supreme court of New York, the almost identical question was decided, and is reported in 6 John, R., 320. In 21 Wend. R., 509, the English cases are referred to and reviewed, and 382 it is there holden, that it is no felony to make or pass a *counterfeit* note, when the circulation of genuine notes of the same denomination and description is prohibited by statute, and the indictment lay the intent to defraud the *receiver of the bill*. The law forbids forgery or a fraudulent uttering, to be predicated on an instrument nugatory on its face. (21 Wend., 521.)

In the case at bar, the intent, throughout, is laid to defraud the receiver of the bill. The bill is nugatory on its face. If genuine, it cannot be made available, but by a palpable violation of law by the receiver, and it is no legal crime, under the laws of Ohio, to utter and publish or attempt to pass such a bank note.

We are, therefore, of the opinion, the judgment of the court of common pleas should be reversed, and the plaintiff in error discharged from imprisonment.

C. H. Brough, for the State.

J. F. Meline, for Jonte.

NOTE BY THE EDITOR. From conversation with Judge WOOD, I feel authorized to say, that had the indictment charged an intent to defraud the bank whose notes were counterfeited, instead of the person to whom they were passed, the conviction would have been sustained. I would further add, that the fourth section of the act of March 23d, 1840, was repealed by the act of March 7th, 1842, which took effect March 1st, 1843; so that without changing the indictment as above suggested, it would be good for any offense perpetrated since the date last mentioned.

SUPREME COURT OF OHIO.

[Supreme Court of Ohio, Cincinnati, Hamilton County, April Term, 1844.]

393 [This court, held by Judges LANE and WOOD, commenced its session on the 4th of April, which terminated by the limitation of the law, on the 1st of May. This court has no reporter, unless some of the judges should do as Judge WRIGHT did (thanks to him), report their own decisions. It is therefore my purpose to make known, through this journal, as many of the points decided as I can obtain the means of doing. To enable me to do this, I have applied to the court and bar for all the aid they can render. I have the promise of several full reports. In the meantime, I give below a statement of such points as I heard the court decide, in as brief a form as possible. I have submitted it to the judges, and publish it with their sanction.]—ED.

DODSON v. RIDDLE ET AL.—*Attorney and Client*.—A client has a right to dismiss an attorney, at any time, although he has paid no fees; and in such case the attorney has no lien upon the papers *filed by him in court*, and cannot withdraw them.

LONG v. LIST.—*Common Carriers*.—Defendant was clerk of the steamboat Brownsville. Plaintiff's agent requested him to take a package of money to Louisville. He consented to do so without reward.

The money was counted, the letter sealed, properly addressed and the amount of money noted on the outside. The river being very low, the Brownsville exchanged freight and passengers with the Pekin, at the Warsaw bar. The captain of the Pekin promised to deliver the package as addressed. He did not readily find the man, and dropped it into the post-office. It never reached its destination. The court, to whom it was submitted, without assigning any reasons, gave judgment for the defendant.

DOE EX DEM. CONCLIN V. PHILLIPS.—*Jurisdiction*.—In ejectment, the question of want of jurisdiction, on the ground that the land involved in the case is not worth one thousand dollars, may be raised after judgment at a previous term, the case being retained for valuation of improvements; and on motion to dismiss, the court will hear evidence as to value.

VATTIER V. JOHNSTON.—*Dower*.—*Retroactive law*.—The act of January 11, 1843, in relation to dower, which gives to the widow one-third of the rents and profits accruing between the time of filing her petition and the time of assigning dower, though in terms embracing then existing suits, is void so far as relates to such suits, and can only operate prospectively.

WEIZELL, ADMINISTRATOR OF BEIDENBUCKER, V. THE CINCINNATI SAVINGS INSTITUTION.—*Foreign Administration*.—Plaintiff's intestate, residing in Tennessee, where he died, had deposited money with defendants. Administration was first granted in Tennessee, and afterwards in this county. Defendants promised to pay the deposit to the Tennessee administrator, without notice that one had been appointed here, and paid after notice. The latter brought this suit. *Held*, that he could not recover, because, by the law of Ohio, a foreign administrator has authority to collect debts here, and the liability attached at the time of making the promise. 394

BUTLER V. THE STEAM FERRY BOAT.—*Construction of the Steamboat Law*.—This was a motion to dismiss for want of jurisdiction. The question was, whether a steam ferry boat, used only as a ferry boat, is within the description of "steamboats and other watercrafts navigating," etc., in the act of 1840, authorizing proceedings *in rem*. *Held*, that it was, and motion overruled.

THE STATE OF OHIO V. PERKINS.—*Proof of Property in Burglary*.—The indictment charged burglary in the store of Martha Jones. She testified, that she separated from her husband four years ago, had not seen him for more than a year, had heard six months before that he was dead, was conducting business for herself, and the stock in trade was of her own earning. On application for a writ of error, *held*, that this evidence tended to prove the allegation of property, and writ refused.

NICHOLS V. THE STATE OF OHIO.—*Confessions of a Prisoner*.—The prisoner was induced to confess a larceny, on the representation that it would be better for him, and might prevent a prosecution. Shortly after he repeated the confession before a magistrate without additional solicitation. The court below rejected the first, but received the second confession. *Held*, that both ought to have been rejected, because the first representation led to the second confession, as much as to the first. Judgment reversed.

BALSER v. SINGER.—*Deposition.*—When a witness serves the notice to take his deposition, he may prove such service in the deposition itself; and if the distance be within twenty miles, a notice served at 5 P. M., to take a deposition between 2 and 5 P. M., on the next day, is sufficient under our statute.

FLINN v. ELLIOT'S ADMINISTRATOR.—*Covenant.*—*Statute of Limitations.*—Where a mortgage contains the ordinary condition of defeasance upon payment of a sum certain, and there is no other evidence of indebtedness, covenant will lie upon the mortgage; and when a demurrer to the declaration has been overruled, leave will not be given to plead the statute of limitations, this not being a plea to be favored.

MALPIN v. GRAHAM.—*Scire Facias.*—A writ of *scire facias*, which contains all the allegations essential to a recovery, supercedes the necessity of a declaration; but where the allegation is, that it is represented by the plaintiff's attorney, that the defendant ought to be made a party to a judgment, the writ is defective as a declaration, and a judgment would be erroneous.

GILMAN v. SPEAKER.—*Married Woman.*—A wife agreed with her husband to unite with him in a conveyance of her lands, provided one-half of the purchase money should be paid to her to dispose of as she pleased. This one-half was invested by her, through a friend, in other land, and the deed taken to her husband. There was no proof, that this was, or was not according to her own directions. *Held*, that her heirs could not recover.

DRAKE'S EXECUTOR v. BRACKETT.—*Chancery Practice.*—Where a bill of foreclosure sets forth some notes as past due, and others as running to maturity, a decree may be taken for all the notes due at the time of the decree, without a supplemental bill.

BAYLEY v. PEARMAN ET AL.—*Appeal—Chancery.*—Sundry persons recovered judgments against Moore, before a justice of the peace. Pearman became his security for stay of execution. Moore removed to Missouri, leaving no property here, but not insolvent. Before the stay expired, Pearman filed his bill in chancery to subject a note, given by Miller & Lee to Moore, not negotiable, to the satisfaction of these judgments. Before this bill was filed, Bayley had purchased this note for a valuable consideration, and obtaining leave to defend, filed his answer and cross bill. Before decree in the superior court the note matured, and Miller & Lee deposited the amount in bank to abide the decree. The superior court decreed in favor of Pearman and the judgment creditors, and the money was drawn from the bank at once and distributed among them. Bayley appealed to the supreme court and obtained a decree reversing the one below. This was sent back for execution. But as the money had been distributed, Bayley filed a bill to carry this last decree into effect, making the judgment creditors parties. They answered, that they had received the money when offered to them under the decree; and knew nothing else of the conflicting claims. The superior court decreed that they should refund. They appealed, and the supreme court decreed that they should refund with interest and costs.

RICE v. BUCHANAN.—*Abbreviation.*—It is not in error to abbreviate thus in a declaration—"damages one thous. dollars"—though the practice is not to be commended.

DOUGHERTY V. THE STATE.—*Misconduct of Jurors.*—In a criminal case, after the jury had retired under charge of an officer, the fact that one juror separated from the rest, and went to a coffeehouse, and drank spirituous liquor, without leave, but not to excess, is not of itself sufficient ground for setting aside the verdict; though it is an impropriety for which the juror ought to be punished. Judgment of the common pleas affirmed. See *ante*, 271.

KEMPER V. CINCINNATI, COLUMBUS AND WOOSTER TURNPIKE COMPANY.—*Occupying Claimant Law.*—Where a corporation, miscon- 396
struing its charter, takes land not authorized, and erects a toll-house thereon, and is ejected, it may claim the benefit of the occupying claimant law.

ARMSTRONG V. WADE.—*Chancery Practice.*—Where the senior mortgagee files his bill to foreclose, and obtains satisfaction without a sale, a junior mortgagee, who has filed an answer, cannot have a decree of foreclosure, without a cross bill.

HARBESON V. GANO.—*Chancery Practice.*—Complainant may dismiss his bill as to some of the defendants, who have not been served, without consent of other defendants who have not answered.

MARTIN V. KEPNER AND WOLF.—*Parol Surrender of Lease.*—Plaintiff made a lease to defendants for five years, which was duly executed and recorded. After about two years he told defendants the house must soon be taken down, as the city was about to widen the street. They said they would move out as soon as they could, and did move in a week or two, perhaps notifying plaintiff. The house was not taken down for more than a year after. Plaintiff took possession, leased again for a less rent, and notified defendants that he should hold them for the difference. This action was brought for such difference. The court charged the jury, that a parol surrender of a lease, if accepted and executed, was good; but a mere promise to surrender at a convenient time, was not a surrender; and if defendants left the premises without the consent of plaintiff, he might lease to another and charge them with the difference. Verdict for defendants.

WHALON'S ADMINISTRATOR V. GLENN.—*Practice—Recognizance for Stay of Execution.*—*Held*, that bail may be put in for stay of execution on a judgment before a justice of the peace, after the ten days have expired, with the consent of plaintiff; and that debt will lie on the recognizance, the statutory proceeding by *scire facias* being merely cumulative.

STRADER V. LLOYD.—*Bankruptcy.*—Where defendant pleads a discharge in bankruptcy, such plea is proved by the certificate only, without an exemplification of the record.

VALENTINE V. WHITTON.—*Bastardy.*—Where the plea is, that the parties compromised before a magistrate, and the entry on his docket only shows that they compromised to the satisfaction of the complainant, without stating that the defendant paid her anything for the support of the child, or gave any security to indemnify the township, the defence is not made out.

LYON V. RANDALL.—*Scire facias against Special Bail.*—It is error to render a judgment by default against bail, when there were not fifteen days between the service and return of the writ of *scire facias*, 397

although this period had elapsed before the actual entry of judgment on the journal.

ATKINS V. CONE.—*Chancery Practice.*—Where a single woman marries after commencing a suit in chancery, the suit will abate unless husband and wife file a bill of revivor and supplement.

STALL V. GLASCOE AND HARRISON.—*Partnership—Award.*—Although one partner, as such, has no authority to submit a controversy to arbitration, yet where suit is brought against a partnership, and one only appears and defends, and an order is entered, by agreement, to refer the claim to arbitration, the other partner, who is in default, cannot object to the award on the ground of his not having assented to the submission.

WHITE V. PERRINE.—*Evidence—Transcript of Justice of the Peace.*—In an action against a constable for a false return, the transcript of a justice of the peace is evidence of the writ and return, without producing the original.

GOLDEN'S ADMINISTRATOR V. MCCONNELL.—*Evidence—Surety.*—Where the title of a case on the docket of a justice of the peace is against one as principal and another as bail, this may be treated in the court above as mere description, and the true position of the parties may be shown by parol.

MITCHELL V. CHASE AND BALL.—*Attachment—Priority.*—Where a claim is assigned *bona fide* in New York, before such claim is attached here, though notice of such assignment had not reached here at the time of the attachment, the assignee has the preference.

LEATHERS V. COCKERELL.—*Cause for Continuance.*—When a cause is called for trial, and the witnesses for defendant, having been regularly served with subpoenas, are not in court, the defendant may have the cause continued at his costs; and on motion of plaintiff such witnesses will be attached. The court further intimated, that plaintiff might also have his action against them.

IBBOTSON AND BROTHERS V. I. D. WHEELER & Co.—*Action on a lost Note.*—Plaintiffs had negotiated the note of defendants to an English banker, who transmitted the same to his agent in New York for collection. The agent deposited it in bank. It was protested, taken up by the agent, and by him lost. *Held*, that plaintiff's right to sue at law, which they parted with when they indorsed the note, could only be restored by having the note returned, or showing a present title. Judgment of non-suit.

398 EASTON V. PERRY.—*Compromise by parties after assignment of the judgment.*—Perry recovered judgment in the court below, in replevin, and assigned it in trust to secure attorney's fees and other claims. Easton appealed. Pending the appeal the parties compromised without the knowledge or consent of those for whose benefit the judgment was assigned. *Held*, that they had a right so to do.

VATTIER'S ADMINISTRATOR V. FINDLAY'S EXECUTORS.—*Covenants in a defective deed.*—Where an instrument intended for a deed has only one witness, the statute requiring two, though such instrument is not valid as a deed, a personal covenant contained therein is as binding on the obligor, as if the deed had all the legal requisites.

REEDER V. METCALF.—*Judgment Lien.*—A pre-existing equity has the preference over a subsequent judgment lien; and the consideration of a deed creating such equity may be explained by parol.

DAVENPORT V. DANA.—*Assignment in Trust.*—Where a person embarrassed, though perhaps not insolvent, makes an assignment of all his effects for the benefit of all his creditors *pro rata*, but the assignees never take possession, allowing the assignee to act as if no assignment had been made, a court of chancery will set aside such assignment; and if the assets have been misapplied, will hold the assignees accountable.

LEISURE V. THE STATE OF OHIO.—*Variance.*—Where an indictment for counterfeiting described the note as Letter A, and the note produced was Aa, the variance was held not to be material; and where the intent alleged was to defraud the principal, and the proof was, that the note was passed to his agent, it was held, that this also was not material.

ALLEN V. BROWN.—*Mortgage.*—Where a mortgagee, having the first lien, purchases the property at sheriff's sale on a subsequent judgment, he may, on application to a court of chancery, have the purchase money appropriated to pay off his mortgage, next after costs.

HILL V. CALLOWAY.—*Giving time to Principal.*—An agreement to give time to the principal, so as to discharge the surety, must be upon such a consideration as to make it binding in law. And an agreement to pay interest above the legal rate, though a note be given, is not such a consideration.

LIABILITY OF BANKERS—NONSUIT.

404

[Supreme Court of Ohio, Hamilton County, April Term, 1844.]

Before Lane, C. J., and Wood, J.

ROBERT FULTON V. JOHN BATES AND OTHERS.

[Reported by CHARLES FOX.]

This was an action of assumpsit, brought by the plaintiff as holder of bank notes issued by the bank of West Union, by the name of the president, directors and company of the bank of West Union, payable to bearer. The notes were dated from 1837 to January, 1840, and were proved to have been issued under the orders of the board of directors of the bank. The West Union bank was chartered in 1816. By an act of the legislature, passed 6th January, 1827, the charter of the bank was so amended as to substitute a board of five directors instead of thirteen, as required by the original act, and contained this proviso: "Provided, that the said bank shall not hereafter issue any bank note or notes intended as a circulating medium; and that said company shall not transact any other business, than such as is necessary to close and finally settle its concerns." Under this last amendment the bank proceeded to wind up its business, and having nearly settled its affairs, the stockholders concluded to resuscitate the bank; and accordingly, in 1836, the old commissioners advertised the sale of \$100,000 of new stock in the bank, and after advertising for subscribers for ten or twelve months, the defendants subscribed for sundry shares. It was also shown that the defendants sold out all their stock in the bank on 31st of August, 1840. It was also shown that the bank paid a regular tax on its dividends, under the law taxing banks, from the 1837 to 1841, and was regularly examined and its

affairs reported on by the bank commissioners, in the same manner as other banking institutions.

408 Under the above state of facts it was claimed, by the plaintiff that the defendants were personally liable as members of an illegal banking association, inasmuch as the amendatory law took away the authority of the bank to issue notes for circulation.

The defendants move the court to overrule the testimony, and order a nonsuit, under the statute for the following reasons:

First—Because the notes were issued by the bank in its corporate capacity, and therefore were valid and obligatory against the bank.

Second—That even admitting that the amendment, by a fair construction, prohibited the bank from issuing notes, would only amount to cause for forfeiting its charter; and whether the charter had been violated or not, could only be ascertained by a proceeding under the *quo warranto* act, and could not be inquired of in the present form of action.

Third—If the plaintiff could inquire in this form of action into the legality of the issue, and succeed in establishing the illegality of the notes, then the notes being issued contrary to the positive provisions of the statute, declaring such notes should not be issued, no recovery could be had in a court of law on such illegal issues.

The court ordered the testimony to be overruled, and reserved all the questions arising in the case for decision at the court in bank.

W. M. Corry and *W. McCarty*, for Plaintiffs.

Chas. Fox and *Wright, Coffin & Miner*, for Defendants.

[Further Report by WM. M. CORRY.]

This was an action of assumpsit to recover the amount of certain notes issued by an unauthorized company, in the name of the bank of West Union. After the close of the plaintiff's testimony, defendants' counsel moved for a nonsuit. The court intimated that it presented questions proper to be reserved for the court in bank; but proposed to nonsuit the plaintiff, and reserve the case.

W. M. Corry and *W. M. McCarty*, for the plaintiff, objected to the nonsuit, and claimed that correct practice required a verdict for the plaintiff, subject to the opinion of all the judges in bank, upon his right to recover. They admitted that this court have laid down the rule to be, that if they were clearly of opinion that the plaintiff's case has failed altogether, they should nonsuit him; but insisted that wherever the court have any doubts as to the plaintiff's right of action, the jury should be directed to give him a verdict, if the facts will justify it, subject to the subsequent opinion of the court. That the present was such a doubtful case seemed to be shown by its reservation to bank. If then the jury find that the plaintiff has not made out his case on the facts, they will render a verdict for the defendant, and there will be no question for the court in bank. If they find for the plaintiff on the facts, and the court in bank decide the law in his favor, then nothing remains but to enter judgment on the verdict. But if the plaintiff were nonsuited, and the court in bank were in his favor, the case must be sent to another jury, and the witnesses re-
408 examined. This would be attended with unnecessary delay, expense, and trouble, and at the best was an idle repetition of all the forms of trial. Should the second jury decide that the facts were against the plaintiff, it would be worse than idle. In the most favorable view, a nonsuit, under the circumstances, would put the court in bank in the

dilemma of deciding points of law upon a hypothetical state of the case; and afterwards sending the hypothesis back to a jury to ascertain whether it were true or not. It was also submitted, that no precedent could be given for such a nonsuit.

C. Fox and *C. D. Coffin*, *contra*, contended that the plaintiff had not made out a case; and that such nonsuits were quite common, and the best mode of getting the case fairly before the court in bank.

The court nonsuited the plaintiff and reserved the case for the court in bank.

EVIDENCE—SALES.

410

[Supreme Court of Ohio, Meigs County, March Term, A. D. 1844.]

Before Lane, C. J. and Reed, J.

ABRAHAM STRAUS V. PAYNE AND OTHERS.

[Reported by SIMMON NASH.]

Where plaintiff claims title to goods under an oral transfer, and it comes out on cross examination of his witness that there was a written bill of sale, he must produce it.

And if such a bill of sale, when produced, shows that the sale was made to a third person in trust for the plaintiff, he must be nonsuited.

This was an action of trespass, brought by the plaintiff against the defendant for taking certain goods. The defendant, Payne, justified as a constable, under certain writs of execution against Levi & Straus. The case was this: Levi & Straus were merchants, doing business at Rutland in said county, and being in failing circumstances, undertook to make a transfer of their merchandise to protect it from the execution, which came to the hands of said Payne.

The plaintiff claimed title to the goods by virtue of a sale, in consideration of prior indebtedness, made by said Levi & Straus to him. To prove the fact of such sale, Isaac Lyon was called to the stand, and testified generally that defendants took plaintiff's goods, and the value of the same. On cross-examination, he stated that plaintiff himself was absent at time of the sale, and had never been in possession of the goods otherwise than through the witness; that the witness, as agent of the plaintiff, had made the purchase for him, and received the possession of the same; that a bill of sale in writing was executed by Levi & Straus of the goods, and that he had no possession of them except under and by virtue of said bill of sale.

Nash, for the defendants, objected that plaintiff could not proceed 411 without producing the bill of sale, as that was the best evidence of what the sale was. He cited *Foster v. Cherry*, 2 Nott. and McCord, 367, where the court decided that in an action of trover for certain negroes, when they had been formerly delivered to the plaintiff and a deed executed at the same time for them, the plaintiff could not recover unless he produced the deed, or showed its loss. *Vide* also, 2 Phillips Ev., 547, Cowen's Notes; 2 Starkie Ev., 550; 2 Starkie Rep., 105; 1 Com. Law Rep., 263.

Welch, contra, contended that as personal property could be transferred by parol, it was optional with him whether he proved his title by the bill of sale or by parol evidence.

REED, J. (absent, LANE, C. J.), held that the plaintiff was not bound to produce the bill of sale; but if defendants wished to use it they must produce it in evidence.

The plaintiff having closed his case, Nash, for defendants, offered the bill of sale in evidence, and moved for a non suit, on the ground that by it the title to the goods was vested in the witness, Isaac Lyon, and not in the plaintiff.

The bill of sale stated that in consideration of \$2,300 to them paid by Isaac Lyon, agent for Abraham Straus, the said Levi & Straus sold and conveyed to Isaac Lyon, for the use of Abraham Straus, certain goods therein specified; to have and to hold the same to said Isaac Lyon for the use of the said Abraham Straus; and Levi & Straus agreed to secure them to Isaac Lyon for the use of said Abraham Straus.

Nash contended that the bill of sale, by its very terms, vested the legal title to the goods to Lyon for the use of plaintiff, and that parol evidence could not be admitted to show an intention on the part of Levi & Straus and Lyon different from that expressed in the bill of sale. In support of this proposition the following authorities were cited and examined: Long on Sales, 41-43, 196; 12 Mod., 344; *Kelley v. Wilson*, 1 R. & W., 178; Story on Agency, 403-406; *Buffum v. Chadwick*, 8 Mass. Rep., 103; *Foster v. Cherry*, 2 Nott & McCord, 367; *Allen v. Potter*, 2 McCord's Rep., 323; *Lana v. Neal*, 2 Starkie Rep., 94; *La Forge v. Rickel*, 2 Wend. Rep., 187; *Stackpole v. Arnold*, 8 Mass. Rep., 27; *Reed v. Wood*, 9 Verm. Rep., 285; *Van Ostrand v. Reed*, 1 Wend. Rep., 424-432; *Reed v. Duncan*, 2 McCord, 167; *Hitchcock v. Harris*, 1 Miller's Law Rep., 311; 3 Phillips Ev., 1467; Cowen's Note, 984; 3 *Ib.* 1469-1470, note.

Welch, contra, argued, that the true intention of the parties might be shown by parol evidence, as the case did not come within the statute of frauds, and that the intention of Lyon to receive the goods for plaintiff by operation of law passed the title from Lyon to plaintiff.

REED, J., said, though he had a very decided opinion upon the question presented, he yet did not wish to decide it without consultation with Judge LANE; (who was out of court at the time through indisposition); that since the argument, he had conferred with the Chief Justice, 412 and that the whole court were clearly of the opinion that the plaintiff could not recover. The plaintiff was never in possession of the goods, and Lyon held possession under a bill of sale, which clearly vested the legal title to the goods in him, and not in the plaintiff. This bill of sale was clear and explicit, and admitted of no uncertainty, and to admit parol evidence to explain that instrument, or to show an intention in the parties different from that so clearly expressed in the bill of sale itself would be to disregard and overturn one of the best established and most important rules of evidence known to the law. The plaintiff must be called.

NOTE. His Honor, Judge REED, undoubtedly, in the hurry of the trial, committed an error in not compelling the plaintiff to produce the bill of sale, when its existence was brought out on cross-examination. The discussion on the other point would seem to be conclusive on the

first; if the best, then the only evidence. The case of *Foster v. Cherry*, cited in the argument as directly in point, does not stand alone. In *Brain v. Hardin and others*, 2 Carr. and Payne, 52; S. C. 12 Com. Law Rep., 24; it was decided, that "if it appear that the purchase (puncheons of brandy), by the plaintiff, was by a *written* agreement, such written agreement must be produced; and if it is not, the plaintiff will not be allowed to give other evidence of his buying the goods." The existence of the written agreement in this case, as in the one at the bar, was disclosed on the cross-examination of a witness, and the objection raised in the same manner. The case of *Blood v. Harrington*, 8 Pick. Rep., 552, would seem to countenance a contrary doctrine; though the ground of that decision appears to have rested upon the peculiar practice regulating appeals in Massachusetts from the common pleas to the supreme court.

PAYMENT TO BANK IN ITS NOTES.

[Supreme Court of Ohio, Gallia County, March Term, A. D. 1841.]

Before Lane, C. J. and Reed, J.

BANK OF GALLIPOLIS FOR THE USE OF NEAL V. GATES AND GUILDER.

[Reported by SIMMON NASH.]

Under the banking law of this state, a debtor cannot claim to pay the assignee of a bank, even when the note assigned was not negotiable, in the notes of such bank, unless he had the notes prior to notice of assignment.

This was an action of assumpsit upon a promissory note not negotiable, given by defendants to plaintiffs before the failure of the bank on the 23d of January, 1841, and at the time of that failure, assigned to said Wm. L. P. Neal, in redemption of the paper of the bank then held and presented by Neal.

The defendants proved that Gates went to the bank on the 25th of January, A. D. 1841, and called for his note, and stated 413 he was prepared to pay it in the paper of the bank; he was told the note had been assigned; Gates showed no paper of the bank at the time, nor did he make any tender of the same at that time. On the 26th he tendered to the bank the amount of the note in its own paper, which was refused, as the note had been then assigned. A part of the paper tendered was proved to have been obtained on the 26th, just before going into the bank. The defendants brought the paper of the bank into court.

Perry & Menager, for Plaintiff.

Nash & Cushing, for Defendants.

LANE, C. J., charged the jury to the following effect:

The question for you to decide, gentlemen of the jury, is a simple one; had the defendant, Gates, the paper of the bank *bona fide* obtained, at the time he had notice of the assignment of his note on the 25th? The law designs to do exact justice between the parties; if the defendants, when they had notice of this assignment, had this paper of the bank here offered to be offset, then you will find a verdict for the defendants; but if you shall find that the paper was

obtained by them after such notice, then you will find a verdict for the plaintiff for the amount of the note and interest. It would be a fraud on the rights of Neal if the law were to permit the defendants to pay off this note in paper obtained for almost nothing, and after they knew of this assignment. The law will not countenance fraud.
Verdict for plaintiff.

416

CRIMINAL LAW.

[Court of Common Pleas, Scioto County, Ohio, April Term, 1844.]

THE STATE OF OHIO V. DANIEL LOWREY.

(Reported by JOHN E. HANNA, President Judge of the Eighth Judicial Circuit.)

Prisoner standing mute. Jury impaneled and disagreed. Feigned insanity.

The prisoner being arraigned stood mute, showing at the same time symptoms of insanity. His countenance was pale and haggard, his hair was long and uncombed, and his garments most carelessly adjusted. His eyebrows, shaggy and dark, were contracted, which gave to his black eyes, which were set deep in his head, a most wild and insane aspect. He constantly employed one hand in tapping upon the floor, on which he sat as matter of choice, whilst with the other, he was engaged in picking up and apparently scrutinizing any small substance which he could find laying upon the floor.

He gave no symptoms of consciousness of being in a court of justice, much less of being arraigned there upon a charge, the investigation of which would jeopardize his liberty. Being asked by the court if he had employed counsel in his defense he made no reply; whereupon the court appointed Legrand Byington, Esq., to defend him.

Mr. B. moved the court to impanel a jury under the provisions of the 25th section of the act directing the mode of trial in criminal cases.

The jury being impaneled and sworn, the following testimony was introduced on part of the prisoner.

Hugh Cook (jailor), being sworn, stated that the prisoner had been committed on the 25th of December, 1843, and that about four weeks afterward he was taken sick of a pleurisy, which continued for a week or
416 ten days when he began to recover; and at the same time showed symptoms of insanity, which continued for a few days only; he was again of sound mind, in which condition he continued for near a month, at which time he became again apparently deranged, and has continued so to the present time. Witness watched the prisoner carefully and was unable to detect any lucid intervals, or times when the prisoner was not displaying insane conduct. Witness had heard him at all hours of the night tapping in his cell, and had heard the other prisoners complain of a want of sleep from the noise which he continually kept up in the jail. That the prisoner, during his apparent insanity, had been in a habit of picking up things and tearing them to pieces; that he had known him to tear into pieces with his teeth and fingers large pieces of hard, seasoned hickory wood which had been furnished for fuel in the jail; and that witness had been unable for the last six weeks to draw from the prisoner a sensible remark upon any subject. That previously the prisoner had been constantly complaining of the suffering of his wife and children

during his absence, but that since his apparent insanity he had not mentioned their names. That prisoner's appetite was good.

John Cook (sheriff), being sworn, stated that the prisoner had been laboring under the same apparent insanity for the last five or six weeks.

Five physicians were then called who examined the prisoner, one of whom had attended the prisoner during his attack of the pleurisy, and had seen him several times during his apparent insanity, and was of opinion that there was method in every thing he did. The other physicians were unwilling to express opinions in regard to his sanity, from the slight opportunity they had had of examining his case. Prisoner's pulse was quick, and no discharge from his nasal organs, which were regarded as slight, but not sure tests of insanity. That the prisoner's symptoms of insanity were of the idiotic class, that they might be feigned.

The case was argued by *S. M. Tracy* for the state, and *Legrand Byington* for the prisoner.

The court, Hanna, president judge, instructed the jury that if they were satisfied from the evidence that the prisoner was laboring under alienation of mind their verdict would be, "That the prisoner stood mute by the act of God." But if they were satisfied from the evidence that the prisoner's conduct was feigned, and that he was dissembling, that then their verdict should be, "That he stood mute obstinately, and on purpose."

The jury retired to consider of their verdict at 5 o'clock P. M., and returned into court the next morning at 9 o'clock, and reported that they had not agreed upon a verdict, and that they were not likely to agree. Whereupon, the court discharged the jury and remanded the prisoner to jail.

On the evening of the same day, the prisoner being restored to his right mind, sent for Mr. Byington to consult with him concerning his trial, which was set for the day following. His trial came on, and the jury not being able to agree upon a verdict in regard to his guilt or innocence of the crime of which he was charged, were discharged and his case continued till the next term.

LANDLORD AND TENANT.

417

[Supreme Court of Ohio, Hamilton County, April Term, 1844.]

Before Lane, J. C., and Read, J.

BOYD'S LESSEE v. TALBERT.

[Reported by W. M. CORRY.]

When a landlord enters for nonpayment of rent, and is afterwards ejected because rent was not demanded before sunset, he may claim the benefit of the occupying claimant law.

This was an action of ejectment tried at the last term of this court, and reserved for the opinion of the court in bank. The defendant entered the property in question, claiming it was forfeited for nonpayment of rent. The court held, that a demand of rent to work a

forfeiture of a lease must not be made after sunset, but there being some question whether the court had properly directed the jury as to the amount of rent that ought to have been demanded, the case was sent back for inquiry on that point.

W. M. Corry, for the plaintiff, now contended that it was unnecessary to pursue this inquiry, for that the demand not having been made in proper time, it was immaterial whether the proper amount had been demanded or not. He therefore prayed judgment for the plaintiff.

V. Worthington resisted the motion, insisting that the jury had been misdirected, and that defendant was therefore entitled to a new trial.

The court gave judgment for the plaintiff, observing that it would be futile, under the circumstances, to grant a new trial.

V. Worthington and *T. J. Strait* then moved the court to extend to defendant the benefit of the act for the relief of occupying claimants of land. Swan's Stat., 605. That act provides, that occupying claimants being in quiet possession of lands, or tenants under deed, and purchasers under executions, decrees, etc., shall not be turned out of possession by any person who shall establish a better title, until said occupying claimant shall be paid the value of all lasting and valuable improvements made on the land, previous to the commencement of the action of ejectment.

W. M. Corry and *W. R. Morris*, *contra*, contended that the defendant did not hold under a deed within the meaning of the act, but held as a trespasser by virtue of a pretended forfeiture of the lease which pretense had been found to be groundless by the verdict and judgment in this action.

418 The court inquired whether the defendant did not hold his title as landlord under a deed, which fact being admitted, an order was made in favor of the defendant as prayed.

PRACTICE—NAME OF PARTY.

[Supreme Court of Ohio, Hamilton County, April Term, 1844.]

WILLIS PRAK V. JONATHAN MYERS.

[Reported by WILLIAM RANKIN, JR.]

Where suit is brought upon a judgment recovered in another state, against the defendant by a wrong name, the correct practice is to sue him here by his right name with the proper averments.

Debt brought by the plaintiff against the defendant upon a transcript of a foreign judgment. The declaration alleges the rendition of said judgment against said defendant (*by the name of John Myers*), and further that the said Jonathan (the now defendant) and the said John against whom the said judgment was rendered, *were and are one and the same person and not other and different persons*.

The defendant pleaded 1st, "*Nul tiel record*." 2d, "That he was never served with process to appear in said supposed action, nor did he ever appear and plead in said cause, and this he is ready to verify."

The plaintiff replied to the second plea, "That the defendant was duly served with process, in manner and form, as set forth in plaintiff's declaration, and puts himself upon the country."

Under the first plea the defendant's attorney contended that this action should have been brought against the defendant by the same name as appears of record in the original suit, and that the plaintiff could not sue him by his true name and allege the misnomer in the record.

The court held otherwise and sustained the plaintiff's proceedings.

The court found the second plea sufficiently answered by the testimony in the case and gave judgment for the plaintiff.

Jones & Rankin, for Plaintiff.

C. Fox, for Defendant.

PAYMENT—PARTNERSHIP.

452

[Supreme Court of Ohio, Lawrence County, March Term, 1844.]

Before Lane, C. J., and Read, J.

PAUL, DEMPSEY AND PAUL V. ELLISON.

[Reported by SIMON NASH.]

Where the plaintiff deals with a partnership, which is afterwards dissolved, one of the partners buying out the others and assuming the debts, and plaintiff, knowing this, continues his dealings, keeping a continuous account with the remaining partner, the payments made after dissolution will be applied to the oldest items in the account, thus far exonerating the retiring partners.

And if a settlement takes place after the dissolution, and plaintiff receive the notes of the remaining partner, covering the old as well as new transactions, he thereby exonerates the retiring partners.

This was an action of assumpsit, brought to recover the amount of a promissory note given by the firm of Agnew, Ellison & Co. to the plaintiffs for one thousand five hundred dollars. The note was executed in 1838, while the firm was in existence, payable in the fall of that year. The firm of Agnew, Ellison & Co., consisting of David Agnew, A. P. Ellison, and Jane G. Ellison, was dissolved in May, 1839, by the withdrawal of A. P. and J. G. Ellison from the same; David Agnew having purchased out their interests in the business, and taken upon himself the payment of all the debts of said firm of Agnew, Ellison & Co. The plaintiffs, who owned the Etna furnace, in Lawrence county, had knowledge of the dissolution, and the terms of the same, soon after it took place. The business of Agnew, Ellison & Co. had also been carried on at Hanging Rock, in the same county, though David Agnew resided at Wheeling, Va. The transactions of the two firms had been large, consisting of purchases of pig iron, by Agnew, Ellison & Co. of the plaintiffs. Regular books of accounts were kept by each firm, in which were entered all their dealings; not only all iron and goods sold or bought, but also all promissory notes given or bills drawn and paid. After the dissolution, the plaintiffs continued to deal with David Agnew as with the old firm, carrying forward the old accounts with the simple change of the heading in substituting the name of David Agnew for that of

the old firm. During the year 1839, the plaintiffs and David Agnew settled up all the accounts of the old firm of Agnew, Ellison & Co. and of David Agnew as one account, and in which settlement was embraced this note, now in suit, and David Agnew gave his own promissory notes, on time, for the balance then found due on such settlement. The dealings of plaintiffs with David Agnew, and the accounts between them, were continued on as before, up to the time of the failure of David Agnew in 1840, when there was a balance due plaintiffs of about seven thousand dollars; payments meantime had been made by Agnew, since the dissolution, of thirty thousand dollars, or upwards. The plaintiffs gave in evidence a special contract between them and Agnew, for the
463 delivery of a large amount of pig iron, and stating how payments for the same were to be made. All the pig-iron delivered by the plaintiffs was, however, charged in their account, generally, except one item, which was entered as delivered upon special contract; all the credits were also entered without any specification of being made on any special contract.

Wright, Peck and Nash, for the defendant, Jane G. Ellison (who alone was served with process), contended that the evidence showed a case of current accounts, beginning with the old firm, and ending with the failure of Agnew; and that in such a case, the doctrine of the application of payments applied; that the payments made by Agnew, after the dissolution, should be applied to the earliest items of indebtedness; and as these payments far exceeded the amount due at the time of the dissolution, the note in suit had been paid by operation of law. 4 Phil-
ips, Ev., 131, notes; *Stone v. Seymour and Bouck*, 15 Wend. Rep., 31; 1 Mason Rep., 324; *United States v. Kirkpatrick et al.*, 9 Wheat., 720; 5 S. C. Cond. Rep., 740; 2 Do., 123; 5 Mason Rep., 87; Chitty on Bills, 436, 439; *Strange v. Lee*, 3 East's Rep., 488; *Bordenham v. Purchase*, 2 Barn. and Ald., 39; *Simpson v. Ingham*, 2 B. and C., 72; Gow on Part., 262, 269; Clayton's Case, 1 Merivale's Rep., 604; Collyer on Part., 317, 328.

It was further contended that the subsequent settlement, and taking D. Agnew's notes on time, was a payment of the note in suit. Such is the doctrine recognized. Story on Part., 245, 242; 4 Esp. Rep., 89; 5 Do., 122; *Thompson v. Percival*, 5 Barn. and Adol., 595; *Oakley v. Pasheller*, 10 Bligh Rep., 548; *Gaugh v. Davis*, 4 Price Rep., 400; *Harris v. Lindsay*, 4 Wash. Cir. Court Rep., 271; *Hart v. Alexander*, 2 Mees. and Welsb., 484; *David v. Ellice*, 5 Barn. and Cress., 196; *Lodge v. Dicus*, 3 Barn. and Ald., 611.

S. M. Tracy, for plaintiffs, insisted that it was not a case for the application of payments; that the retaining of the note showed the plaintiffs did not intend to relinquish their hold upon the retiring partners; and that the payments were made for the iron delivered on the special contract, and not upon a general account. No authorities were cited.

LANE, C. J. charged the jury. He first examined the evidence as exhibited by the books of the plaintiffs, and stated to the jury, that the parties, by their manner of keeping the accounts, had made the accounts of the old firm and D. Agnew, one and a continuous account, and that the payments in law were made upon the account generally, and not upon any special contract, as the plaintiffs had so entered all the credits, without separating the transaction under the special contract from those of their general dealings; and hence the payments having been made upon a general account, the law made the application of them,

by making each credit, *pro tanto*, a payment of the earliest items of indebtedness; and that if the credits entered on the books of the plaintiffs, or payments made after the dissolution, by D. Agnew, exceeded the amount due to plaintiffs from the old firm, at the time of the dissolution, then the law said, that that balance was paid. 484

He further charged the jury, that as David Agnew was, by the terms of the dissolution, to pay the debts of the old firm, the retiring partners, with regard to all creditors having a knowledge of these terms, were to be considered in the light of a security; and that if the plaintiffs had settled the accounts of the old firm, embracing this note, and taken the notes of D. Agnew, on time, for the balance due, then the defendant would be discharged.

In conclusion he said to the jury, that the only thing they had to do, was, to take the books of the parties, and see if he had stated their contents truly; and if they found he had, then they must find a verdict for the defendant.

Verdict for defendant.

PARTIES.

[Supreme Court of Ohio, Clermont County, April Term, 1844.]

Before Lane, C. J., and Read, J.

JOHN WAGEMAN, GUARDIAN OF CHARLES ROBINSON, AN INSANE PERSON, v. JOHN M. BROWN.

[Reported by JOHN JOLLIFFE, at the request of Judge LANE.]

The guardian of a lunatic must sue in his own name, though it is otherwise in the case of a minor.

There were several counts in the declaration, all in the name of the guardian. The first count is, in substance, as follows:

"John Wageman, guardian of Charles Robinson, senior, an insane person, complains of John M. Brown, in a *plea* of *assumpsit*; for that whereas, on the ——— at said county, one Holley Raper made his certain promissory note in writing, of that date, and then and there delivered the same to the said John M. Brown, and thereby promised to pay to the order of John M. Brown, ten hundred and eighty dollars, for value received, twelve months after the date thereof, which period has now elapsed; and afterwards, to wit: on the ——— at said county, the said John M. Brown indorsed the same to the said Charles Robinson, senior, and then and there delivered the same to the said Charles. And whereas, afterwards, to wit: on the ——— at said county, the said Charles became, and was and yet continues to be, insane; and so being insane, afterwards, to wit: on the ——— at said county, an inquest was duly held, before George McMahan, esquire, one of the associate judges of said county for the purpose of trying whether the said Charles Robinson, Sr., was or was not insane, upon which such proceedings were had, that the said Charles Robinson, Sr., was then and there found and adjudged to be insane; which finding yet remains in full force, and unreversed. And afterwards, to wit, on the 485

—— at said county, the said John Wageman was duly appointed by the court of common pleas in and for said county, guardian for the said Charles Robinson, Sr., and gave bond and was qualified as such guardian, in due form of law. Of which insanity, inquest and appointment, the said John M. Brown then and there had notice. Yet the said Raper did not pay the amount of said note, although the same was duly presented to him for payment, when it became due, and the said John M. Brown had then and there waived notice of non-payment. And the said Brown afterwards, to wit, on the —— at said county, in consideration of the premises, then and there promised to pay the amount of the said note, to the said *John Wageman, guardian as aforesaid*, on request, yet he has not done so."

The cause was submitted to the court, and damages awarded to the plaintiff; after which a motion was made by defendant in arrest of judgment, because the action was brought in the name of the guardian.

Hamer, for defendant. The person who brings suit in his own name, must have the legal title to the thing in controversy; and as the guardian of a lunatic does not possess this, he cannot sue. Such is the English law. An assignee of a bankrupt, or insolvent, sues in his own name, because the legal title passes from the bankrupt, or insolvent, to the assignee, who becomes sole owner for the use of creditors; but it is not so with a lunatic, for the law supposes he may be restored to his reason again, during the pendency of the suit, and then he forthwith assumes the control of his person and property, and the functions of the committee, or guardian instantly cease. As to suits at law, see 1 Chit. Plead., 11; 2 Saund. Rep. 333, note 4; 4 Com. Dig., 349; 3 Bac. Ab., 541; 1 Tidd's Prac., 8; Shelford on Lunatics, etc., 395. All these authorities are full to the point, that suits cannot be maintained by the committee, in *their* or *his own name*, but must be brought in the name of the lunatic.

In suits in chancery the rule is the same. (See 1 Fonb. Equity, 57; Chitty's Equity Pleading, 65-6-7.) According to these authorities the suit must be in the name of the lunatic himself, and not in that of his committee, or guardian. The only exception is, where a suit is commenced to set aside a contract made by the lunatic; then the bill may be filed with or without making him a party. Such were the cases quoted by Mr. Jolliffe from Johns. Chy. Reports. It is believed they do not change the English rule, or affect the question before the court.

Our statutes have not changed the relative rights or position of the lunatic, and his committee, or guardian, as he is termed in Ohio. The latter has the control of the former, and of his estate, during the continuance of his malady. So has the committee in England. Whenever 456 the incapacity terminates, the power of the guardian ceases. So it does in England. In neither country is the right of property to the lunatic's estate vested in the committee, or guardian; but in both they have a general supervisory control, and may exercise such authority, under the direction of the court, as is necessary for the interest of the lunatic and his family. Our statute does not authorize him to sue *in his own name*. Without this he can have no such right. In the case of assignees of bankrupts and insolvents, *it is expressly given by statute*; and the reason of it is, that the bankrupt and insolvent have lost all claim to the assets, and can never have any further control over them. They belong to creditors.

The guardian may sue or settle in as full a manner as the lunatic himself could do. This, it is thought by the learned counsel for the

plaintiff, gives him the right to sue *in his own name*. Any guardian of minors may sue and settle in as full a manner as the wards could if of full age. They may make contracts respecting partition of real estate, etc. But all this is done *in the name* of the ward. The provision allowing foreign guardians to sue *in their own names*, for the property or person of the lunatic, is an argument *against* the plaintiff. The inclusion of one is the exclusion of the other. If the legislature intended such suits to be brought by domestic guardians, they would have said so; for it is manifest they did not overlook the subject. They intended to leave the law as it was in England, and other states. If they gave a foreigner greater privileges, it arose, perhaps, from that spirit of comity, and generosity, which should always characterize the legislators of a free state. Whether this be so or not, it cannot affect the present question. Foreign and domestic guardians must each stand upon the express provisions of the statute in regard to them. Each possesses the powers given to him, and no more; and the power to sue, *in his own name*, has not been given to the latter.

Guardians of lunatics are likened, by Mr. Jolliffe, to executors, etc., and the lunatic to a decedant. It is submitted, that the reference in the statute to executors, etc., regards only the *mode* of appointing, and does not reach the *consequences* which follow the appointment. Nor does the law consider a lunatic as civilly dead. He is liable for wrongs done by him, as in trespass for example; and may be sued as a living man, and held responsible. He is rather regarded by the law as laboring under a temporary paralysis from which he may be aroused at any moment. He "is not dead but sleepeth." He *loses* no right, but is temporarily deprived of the *exercise* of certain prerogatives, which belong to him. All the statutes to which counsel on the other side has referred, provide for a restoration of all these privileges, the moment his understanding resumes its natural dominion. The *legal right* to all his property, both real and personal, in possession and in action, whether lands, chattels, choses in action, or anything else, *remains in him*. The committee, or guardian, has but the superintendence of it, under the direction of the court; and the guardian can no more sue *in his own name* to recover a debt due the lunatic on a promissory note, than an agent, or attorney, can sue *in his own name*, upon a note due and payable to his principal. In both cases the representative may sue for, collect, settle, and receipt for the amount due, "*in as full and ample a manner*" as the constituent could, if he were present and of sound mind; but in both cases, the business must be conducted, and the suit prosecuted, not in the name of the guardian, or attorney, but in the name of the lunatic or principal. 457

Jolliffe, for plaintiff. The statute, Swan 571, section 8, provides, that "the guardian, or guardians, shall have power to settle all accounts, and to receive, *sue for* and recover all debts and demands due to such person, in as full and ample a manner as such idiot, lunatic, or insane person could do, if he or she were restored to the true use of reason. And such guardian, etc., are hereby authorized and empowered to sell any real estate of such person, as may be necessary for the payment of the debts of such person, in such manner as *executors and administrators* are by law empowered and authorized to do." Again, section 12 provides, "and such person, etc., (foreign guardian) may, *in their proper names*, sustain any proper action for the recovery or protection of the person or *property* of such idiot, lunatic, or insane person." This last provision

appears to be intended to place guardians of lunatics of other states, upon the same footing (after they have made the proper proof), with guardians of such persons in Ohio; and hence the provision, that they may, *in their own proper names*, sue, etc.

The terms of the other provision appear, however, to be too clear for doubt, even without the aid of this. The guardian has power to sue for, and recover, all debts due, etc., "in as full and ample a manner as the lunatic could, if restored to the true use of reason."

That the legislature treats lunatics under guardianship, as persons civilly dead, appears from 2 Chase, 1320: "The courts may appoint guardians for the children of idiot, etc., persons, *in the same manner as though their parents were deceased*." The statute, Swan 570, section 7, provides, that the guardian of the insane person "shall *discharge the duties of guardians* to the minor children of such persons."

The act of January 4, 1802, 1 Chase, 339, section 2, gives the authority to sue, in nearly the same words as the present statute, and in the same sentence also authorizes the guardian "to divide the real estate agreeably to the act entitled an act for the partition of real estate." In the same section is the provision for the sale of the idiot's real estate "in such way and manner as *executors or administrators* may or shall by law be capable, to discharge the debts of the *deceased* persons, when the personal estate of such deceased persons shall be found insufficient."

The fourth section of that act, 1 Chase, 340, provides, "that the judges of probate, in their respective counties, may also, as occasion may require, appoint guardians for the children of idiots, *non compos*, lunatics, or insane persons, in the same way and manner, as though their parents were *naturally* dead." Here we have the idea of the civil death of the lunatic carried out in all its details. The guardian is authorized to sue 458 for the debts due to the lunatic, as in the present statute, to make partition of his real estate; upon the deficiency of personal assets to sell real estate, as executors and administrators may by law sell the estates of *deceased persons*, "when the personal estate of such deceased person shall be found insufficient." And the judges are authorized to appoint *guardians* for the children of idiots, etc., "in the same way and manner as though their parents were *naturally* dead." Nothing could more plainly prove that they were held as *civilly* dead. The words *natural* death were used in contradistinction to the words "*civil* death." If such was the intention of the legislature that passed the law of 1802, such also is the intention of the present law; for the material phraseology of that law is adopted in the present.

In the act of January 15, 1805, 1 Chase, 489, the phraseology is so altered as to read, "in the same manner as though their parents were *actually* dead." The second section of this statute appears to be a transcript of the second section of the statute of 1802. The eighth and ninth sections of the act of February 13, 1815, 2 Chase, 869, are nearly the same on these subjects as the act before mentioned. And the subsequent statutes upon this subject, with occasional changes of phraseology, all show, that the legislature treated insane persons under guardianship, as "*civilly* dead."

If any where the idiot ought to be made a party with his guardian, it would be in chancery. But in *Brasher v. Van Cortland*, 2 Johns. Ch. Rep., 242, it was decided that a lunatic need not be made a party to a suit, by a creditor, against his committee, to obtain payment of a debt out of his estate; and in *Ortley v. Messere*, 7 Johns. Ch. Rep., 139, is a

decision that the lunatic need not be joined as a party plaintiff with his committee. In both these cases, the committee of the lunatic was treated as bearing a relation to the lunatic similar to that, which assignees of a bankrupt or insolvent, bear to the bankrupt or insolvent.

The case was taken under advisement to Hamilton county, where the motion in arrest was overruled, and judgment entered for the plaintiff.

The reporter is authorized by Judge WOOD to state, that he concurs in this opinion; so that it has the sanction of three of the supreme court judges.

PAYMENT—EVIDENCE.

487

[Supreme Court of Ohio, Scioto County, March Term, 1844.]

Before Lane, C. J. and Read, J.

LEWIS V. GAYLORD & CO.

[Reported by SIMMON NASH.]

In an action for work and labor, if defendant relies upon a usage of his establishment to pay in something else than money, he must prove plaintiff's knowledge of such usage at the time of commencing the work, and that he tendered such payment before the commencement of the work. But as to the latter, *quære*.

This was an action of *assumpsit* for work and labor, and on an account stated. Plea, general issue.

The defendants were the owners of an extensive rolling mill and nail factory. The plaintiff had been in their employment as a turner; he had, as was the usage of the defendants, a pass book in which was entered the amount of his work as done, and the payments made by defendants; this account had been looked over at several different times by one of the defendants, and balances struck; and a final balance had been struck in the like way, before the bringing of the suit.

It was further proved that it had been the usage of the defendants in the working of their mill and factory, during all the time the plaintiff worked for them, to pay their workmen in iron and nails at mill prices, or rolling mill scrip, which called for iron and nails, and to pay in consequence higher wages; and evidence was also offered, tending to show that plaintiff knew of this usage when he came to work for defendants, and expected to be paid in that manner.

READ, J., charged the jury that the plaintiff would not be bound by the usage at defendants' establishment, unless a knowledge of it had been brought home to him; and that, as the account had been looked over and a balance struck, admitted to be due, the defendants, if they would avail themselves of the right to pay in iron and nails, must show a tender of the same before the commencement of this suit; and if no such tender was shown, then the plaintiff was entitled to recover the amount so found due.

Verdict for plaintiff for the amount claimed.

Nash & Hutchins moved for a new trial for the misdirection of the judge to the jury; they insisted that in cases like the present, the plaintiff was bound to make a demand before he could maintain an action for the

amount claimed. Such was the general understanding of these contracts; otherwise a workman could at any time after having his account looked over, convert the balance into a money demand by instituting suit, before his employers knew that he was dissatisfied. It was a question of great importance to the country, as the large iron establishments were making
 488 such contracts, and paying high wages, which, if this was the law, could be turned into money by simply bringing a suit.

S. M. & C. O. Tracy for Plaintiff.

The court was divided in opinion, LANE, C. J., being in favor of a new trial; and READ, J., against it. Thereupon the motion was reserved for discussion in bank.

EVIDENCE—PAYMENT.

[Supreme Court of Ohio, Lawrence County, March Term, 1844.]

SEARINGTON & HARDISTY V. JANE E. ELLISON, IMPLEADED WITH A. P.

ELLISON AND DAVID AGNEW.

[Reported by SIMON NASH.]

When one partner, not served with process, has been discharged in bankruptcy, he is a competent witness for his copartners. And where dealings are continued with the remaining partner, after dissolution, and a continuous account kept, payments made by the remaining partner, after the plaintiff knew of the dissolution, will be applied to the exoneration of the retiring partners.

This was an action for goods sold and delivered against the same parties as in the above case. It was submitted to the court without the intervention of a jury.

The plaintiffs proved an account commencing before the dissolution and continuing up to the time of the failure of D. Agnew in 1840. The entire account had been charged to the firm of Agnew, Ellison & Co.; the defendants proved that plaintiffs had notice of the dissolution in the summer after, in July or August, 1839. The accounts showed that the credits entered after the time the plaintiffs knew of the dissolution, exceeded the amount due at that time. There was no evidence that plaintiffs knew the terms upon which the dissolution was made. The plaintiffs lived at Wheeling, and the goods had been ordered by D. Agnew.

The deposition of David Agnew, with a certificate of bankruptcy, was offered in evidence by defendants, and objected to by plaintiffs.

The court admitted the deposition, saying that they had repeatedly held that a co-contractor of the defendant, after having obtained his discharge under the bankrupt law, had no further interest in the suit, and was therefore a competent witness for defendant.

On the case itself, the court struck the balance due at the time when the plaintiffs had knowledge of the fact of the dissolution of the firm of Agnew, Ellison & Co., and gave the defendant credit for all payments made by Agnew after that time without regard to subsequent charges,
 489 and as the credits exceeded the amount due the plaintiffs at the time they heard of the dissolution, the court rendered judgment in favor of the defendants.

EJECTMENT.

515

[Court of Common Pleas, Coshocton County, Ohio, June Term, 1844.]

Hon. C. W. Searle, President Judge.

GURSHWA V. INFELD.

[Reported by C. B. GODDARD.]

Where defendant in ejectment claims the benefit of the occupying claimant law, and plaintiff elects to receive the value of the land, and the court order the same to be paid in installments, and on default a writ of possession to issue, and such writ is issued on default of the first installment, it will be quashed on motion.

Quære, whether it is a good tender of a deed, if in the certificate of acknowledgment the name of the county is left out.

An action of ejectment had been tried between these parties, and Gurshwa's lessee had recovered. Infield obtained the benefit of the occupying claimant law, and at the June term, 1843, Gurshwa elected to receive the value of the land in a state of nature, and the court ordered the sum of "six hundred dollars to be paid at the following times, being the reasonable times allowed by the court for the payment thereof, to wit: three hundred dollars in six months from this day, with interest from this day; and three hundred dollars in twelve months from this day, with interest from this day. And that if the said John Infield shall neglect or refuse to pay said sum of six hundred dollars, with interest, at the times and in the manner mentioned herein; and if the said Philip Gurshwa shall tender to the said John Infield, according to law, a general warranty deed for the land so by him, the said Philip Gurshwa, recovered in the action of ejectment, against the said John Infield, then a writ of possession for said land shall be issued in favor of the said Philip Gurshwa, but not otherwise."

This order was entered on the 23d of June, 1843. Infield failed to make payment of the first installment at the end of the six months. On the 2d of April, 1843, Gurshwa tendered to Infield a deed in full compliance with that part of the order of the court, unless the deed 516 was defective for a reason mentioned below. On the 2d of April, 1843, Gurshwa procured a writ of possession to be issued which was served the next day by turning Infield out of possession, and placing Gurshwa in. On the 17th of June, 1844, being the first day of the June term, Infield tendered to Gurshwa the full amount awarded to Gurshwa with interest, which was refused. He then gave notice of a motion to quash the writ of possession, and for restitution.

Goddard, Stilwell and Campbell, for Infield. 1. The writ issued prematurely. The statute seems to contemplate the payment of a gross sum, not by installments; but whether or not, neither by the statute, nor by the order of the court, could the writ issue, until complete default by the omission to pay both installments. The plaintiff asked in effect for a forfeiture of the defendant's improvements, amounting to seven hundred and thirty dollars, and the court should hold him to the utmost strictness.

2. The acknowledgment of the deed commenced as follows: "The State of Ohio, ——— county. Before me, a justice of the peace within and for said county, personally came," etc. Now, although this may be a valid deed, and convey a good title to the land, will the court compel a

party to take it? Between vendor and vendee a court of equity will not rescind, at the instance of vendor, if the deed tendered contain erasures or interlineations, nor a deed executed by attorney.

If the court quash the writ, every principle of justice requires that restitution be awarded. That such an act is within the power of the court is established by the following authorities: 3 Wils., 49; 5 Johns. Rep., 366.

Spangler, for Gurshwa. 1. The order requires Infield to pay the money "at the times and in the manner mentioned." If he failed to pay the first installment when due, no subsequent payment could be a compliance with the order. According to the argument of the counsel on the other side, Infield could defeat Gurshwa of his writ of possession, by the payment of but one of the installments.

2. The deed is valid, and the insertion of the county in the margin could benefit no one.

The court gave no opinion upon the last point. Upon the first a decided opinion was expressed, quashing the writ, and awarding a writ of restitution to be executed without delay.

550

COUNTY ROAD.

[Court of Common Pleas, Hamilton County, May Term, 1844.]

WILLIAM T. ROLLER, SUPERVISOR, V. TIMOTHY KIRBY.

[Reported by PETER ZINN.]

Action for obstructing a road—What amounts to the establishment of a county road.

This was an action of debt, with a plea of the general issue, brought under the tenth section of the statute "prescribing the duties of supervisors," etc. (Swan's Stat., 809), for obstructing the "Badgeley road," in Millcreek township, Hamilton county. The evidence showed, that in the year 1842 a petition for the road now in controversy had been presented to the commissioners of the county, which was proposed to be run through defendant's premises; and that all the formalities required by the statute had been complied with, in their order, down to the report of the appraisers appointed to assess the damages to defendant by the location of the road. From this report the defendant appealed to the common pleas. Shortly after the appeal was taken, defendant, wishing to make a sale of part of his premises through which the road was located, to the Methodist cemetery company, proposed to the county commissioners a compromise of the appeal, which was concluded on the 7th of December, 1842, as follows:

1. The road running over defendant's premises was to be placed on a line known as "Cooper's survey."

2. The south end of the road, running through the cemetery, was to be abandoned, or vacated.

3. The commissioners were to proceed and grade the road as their means would admit.

4. No costs were to be taxed to defendant.

On these terms, the defendant agreed to fence off the road, and withdraw his claim for damages. The road was accordingly surveyed for

grading in April, 1843, upon "Cooper's line," with the exception of about thirty rods in length, where it deviated some five or six rods from said line. This deviation was made by the surveyor, with the view, as he thought, of meeting Kirby's wishes, and saving expense to the county. A few days afterwards, the surveyor (who was one of the commissioners), made mention of his deviation to the defendant; and a contract for grading having been made, and no objection being made by the defendant, in consequence of the deviation, the grading was finished in July, 1843. The commissioners proceeded to grade the road as their funds admitted; and no costs were taxed to the defendant in any of the proceedings. On the 12th of September, 1843, the commissioners made a survey of the road, directed it to be recorded as a road made by compromise with defendant, and issued an order to plaintiff to have it opened. The road was accordingly recorded as originally surveyed, with the exception of the part passing through the cemetery, which was abandoned; and the alteration, made in pursuance of the compromise, was also recorded separately, as a "record of an alteration of the Badgely road." The road, as altered by the compromise, was not twenty rods distant from the line of the road as first surveyed, and not one hundred rods in length from one point of the intersection with the old road to the other. The appeal of the defendant stood upon the docket of the court until February, 1844, when it was dismissed by consent at the costs of the county. Defendant, not having his fences erected on the sides of the road when the road was finished and ready for travel, plaintiff entered on the line of the road, and removed those which were across the road. Defendant put up the removed fences, and dug two ditches across the line of the road. These were the obstructions complained of, and they were made upon that part of the road fixed by the compromise, but not where the deviation was made by the surveyor. They stopped the entire travel on the road. The evidence was conflicting as to whether the obstruction was made before or after the 12th of September, 1843.

Brough and Zinn, for plaintiffs, made the following points:

First—That although some formalities required by the statute might not have been complied with in locating the road, still it was legal until reversed by certiorari. (3 Ohio R., 306, 257, 325; 7 Ohio R., 257; 9 Ohio R., 114.)

Second—That the commissioners had the power to compromise with the defendant; and he was precluded from setting up anything contrary to his own contract, so as to defeat the legality of the road. (Swan's Stat., 205 to 208, 797 to 804, 934; 5 Ohio R., 204.)

Third—That defendant's acts amounted to a dedication of the ground occupied for a county road, and he was estopped by his own agreement from asserting anything to the contrary. (6 Ohio R., 303; 7 Ib., part 1, 219; Wright's R., 749, 647; 9 Cranch, 292; 12 Wheaton, 582.)

Fourth—That defendant, not having objected to the variation from Cooper's line, at the time he had notice, was precluded by his own silence, which was an acquiescence, from asserting anything to the contrary at this time.

Fifth—That defendant, not having dismissed his appeal, as he had agreed to do, could not be permitted to take advantage of his own wrong, by saying, that the court had no jurisdiction, and that a road could not be made during its pendency.

Sixth—That the commissioners had the power to make an alteration on the line of the road as first established, provided they did not vary

more than twenty feet from the original track, nor more than one hundred feet in length. (32 Local Laws, 199.)

Strait and Collins made the following points for defendant:

First—That in all actions for statutory penalties the law must be construed strictly.

Second—That no road, within the meaning of the statute under which this action was brought, could exist, except it was established in the manner pointed out by the statute.

Third—That the present was not a dedication for a road, but an agreement, and no road could exist by agreement.

552 *Fourth*—That the conditions to be performed by the commissioners were conditions precedent to the performance of any condition by defendant; and that they had not complied with their part of the agreement.

Fifth—That the road had not been located on the agreed line, and the deviation rendered the agreement void.

Sixth—That no road could be established by agreement, pending the appeal, during which time the court alone had power to act in the case.

Seventh—That no order could issue for opening the road until fifteen days after the road had been established. (Swan's Stat., 802, section 47.)

Eighth—That the special act does not apply to the present case, and does not give to the commissioners the power they claim to make the "alteration."

CALDWELL, J., charged the jury, that before a road could legally exist, it was necessary that a record should first be made; and the law contemplated that it should also be opened before an action of the present kind could be brought for obstructing such road. That if they found, that an agreement had been entered into, to dismiss the appeal and for opening the road, and that the commissioners had performed their part, the appeal would be considered a nullity, although pending on the records of the court at the time the road was opened. The commissioners would be bound to run the line as agreed; but if the jury should find, that at the time the variation was made, defendant had notice of it, and made no objection, but permitted the road to be located, he could not be permitted to object at this time. It was his duty to do so at the time he had notice. In locating this road, it was incumbent upon the commissioners to follow the provisions of the statute; but defendant could waive any of these formalities by agreement; and if a road was made in pursuance of any such agreement, it was a dedication to the public for the purpose of a road, and defendant was precluded by his own acts from setting up anything to the contrary. The clause of the statute providing that an order for opening shall not issue until fifteen days after the road should be established, refers to cases appealed to courts alone, and did not apply to the present. If the obstruction were made before the 12th of September, the verdict should be for the defendant; if after that time, and the jury also found that the agreement had been complied with on the part of the commissioners, then the verdict should be for the plaintiff.

The jury found for the defendant.

PAROL EVIDENCE.

553

[Superior Court of Cincinnati, July Term, 1844.]

ANSON MANN AND EUCLID RICE, FOR USE OF EUCLID RICE, v. THOMAS LINDSAY.

[Reported by T. J. HENDERSON.]

Parol evidence is admissible, in a suit by the indorsee against the indorser of a note indorsed in blank, to show, that at the time of the indorsement, the indorsee received the note under an agreement that he would not have recourse upon it against the indorser.

This was an action of assumpsit upon a promissory note given by A. Erwin, payable to Thomas Lindsay or order, and indorsed in blank by Thomas Lindsay to plaintiffs. Before it became due, the note was protested for non-payment, and notice given to the indorser on the 4th of March, 1840.

The defendant proved that in the fore part of March, 1840, he sold the note to plaintiffs for work then done or about to be done, in manufacturing hats, with the distinct understanding, that they were to take the note without recourse upon him. The plaintiffs remarked, that they were anxious to raise the money, and wished to place it in bank for discount or collection; and if he would indorse it, no injury should result to him on account of the same. With this understanding defendant indorsed the note.

A. N. Riddle, for Plaintiffs, cited 1 Greenleaf's Ev., 352.

T. J. Henderson, for Defendant, cited 5 Sergeant and Rawle, 363; 6 Monroe's Reports, 542; Chitty on Bills, 189.

ESTE, J. The evidence in this case is clear, that at the time of the assignment of the note, the plaintiffs took it with the distinct understanding, that they were not to have recourse upon it against defendant, and the only question presented is, whether parol evidence can be admitted to show that the plaintiffs received the note under this agreement. This was not an indorsement in full; and it did not transfer the property and interest in the note to the indorsee without a further act. It gave the plaintiffs the power of constituting themselves the assignees of the beneficial interest, by filling it up payable to themselves, but with the restriction, that it was not to be so filled up as to render Thomas Lindsay, the defendant, liable. It is not the case of a note negotiated to a third person, without notice, but between the original parties to the contract. If the note had been so negotiated, the defendant would have been estopped from setting up this defense. A third person could not have been affected by this agreement. The evidence offered goes to prove a perversion of the indorsement to a purpose never intended—a fraudulent purpose. The contract was for the note of A. Erwin, without the responsibility of Thomas Lindsay. How was the indorsement obtained? By the declaration of plaintiffs, that it was only 554 to be made to enable them to collect the note through the bank, and with the understanding, that defendant was not to be held responsible. The testimony shows the character in which the holders of the note stood, not as indorsee with a full indorsement, but with a blank indorsement, which they had no authority to fill up with a full indorsement, so as to render the indorser liable for payment, or to be resorted to on

account of the insolvency of the drawer. The case in 5 Serg. and Rawle is directly in point. I am of opinion that the testimony is admissible and may be received.

Judgment for the defendant.

563

ATTACHMENT.

[Superior Court of Cincinnati, July Term, 1844.]

JOHN C. STICKNEY v. THE BANK OF THE STATE OF MISSOURI.

[Reported by E. S. HAINES.]

The act of Ohio allowing and regulating writs of attachment, does not extend to foreign corporations.

The affidavit upon which this writ of attachment issued, sets forth, "that the bank of the state of Missouri was indebted, &c., and was not a resident of the state of Ohio, as affiant verily believed," &c. The defendant moved the court "to quash the writ for want of jurisdiction, on the ground that it had been issued against a foreign corporation."

Fox & Lincoln, for the Plaintiff, cited 15 Serg. and R., 173.

E. S. Haines, for Defendant, cited Wright's R., 566; 2 Ohio, 239; 4 Ohio, 155; Serg. on Att., 51; 3 Hals., 178; 5 do., 123-126; Harrison, 367, 62; 2 Dall., 79; 1 Dall., 77, n.; 2 Wash., 386; 2 Mass., 37; 1 South, 383; 13 Johns., 131; 1 Greene, 134; 2 Br., 78; 2 Greene, 183; 16 Johns., 6, 7; Western Law Journal, 375; 3 Mason, 159; 1 Scam., 178.

564 ESTE, J., in substance said, that the earliest attachment laws of Ohio were derived partly from the attachment law of New Jersey, of 1798, and that of Pennsylvania of 1705; and that in giving a construction to the act of 1824, it was important to compare those acts with that of Ohio, and to consider the exigencies of the times when these acts were respectively passed. The Pennsylvania act of 1705, adopted by the judges of the Northwestern Territory, in 1795, was repealed by the territorial legislature, in 1802.

The first section of this act, and of the acts of Ohio of 1805 and of 1824, is very similar in its provisions to the act of 1798 of New Jersey, and is substantially in the same words. And as banking corporations were, in that early day, almost unknown in our land, it cannot be inferred that the legislature, in anticipation of the rapid growth of these institutions, intended to include corporations in the provisions of those several acts. As this proceeding is *ex parte*, and is founded on the oath of an interested party, by which, without bond, the property of the defendant is impounded, and is an innovation on the well settled principles of the common law, it becomes necessary to examine the tenor of the act, for express authority. Under the first section of the act of 1824, the writ can issue upon the oath of the creditor, that the debtor absconded, &c., or, that "such debtor is not a resident of the state," &c.

As a corporation cannot be charged with absconding, a writ cannot issue for that reason. Will the next sentence, as to non-residence, in

clude corporations? From the whole context the court is of the opinion, that it embraces natural persons only, who have the power of changing their residence, and not banking corporations, which cannot be strictly be said to have a domicile. Again, from the ninth section of the act of 1824, it would appear to be the object of the legislature to compel a personal appearance of the absent debtor, and after bail release the property; when the pleading would be *in personam*.

But, as a corporation can appear by attorney only, and cannot give or be surrendered in custody, it cannot repossess itself of the property attached. The entry of bail is the only condition upon which the absent debtor can bring himself into court, and defend the action, unless by electing to have the property attached and remain in custody; and if perishable, the court can order it to be sold at any time after the return of the writ. And in this a corporation can have no election. It cannot have the privilege of natural persons, of giving bail, or being surrendered in custody; and the court is therefore of the opinion, that natural persons only are referred to.

The current of authorities in New Jersey, from which we derive our attachment act, is in favor of this construction; and also those of Pennsylvania, with the single exception of *Bushnel et al. v. The Commonwealth Insurance Co.* (15 Serg. and R., 173—188). This is the opinion of a majority of the court, and the opinion of the dissenting judge (Duncan), seems to this court more in accordance with the letter and spirit of the law, than that of his brother judges.

This question has been decided in 16 Johns., 5; and the reasons of Judge SPENCER are very strong in favor of the attachment of New York applying to natural persons only.

The court is therefore of opinion, that this proceeding is unwarranted by the attachment law of Ohio, and directs the writ to be quashed and the attachment dissolved.

WARRANTY.

46

[Court of Common Pleas for Hamilton County, Ohio, June Term, 1842.]

HORACE S. EDMANDS V. ANTHONY HILTZ.

[Reported by the EDITOR.]

Where goods are sold as being of a certain kind, there is an implied warranty that they are of that kind.

The plaintiff had bought of the defendant a quantity of pork in barrels, branded as "*Mess Pork*." What shall constitute mess pork is determined by statute. (Swan, 457, 59.) Defendant spoke of it as an extra article, but said he would not warrant it, and told plaintiff to examine it, which he did not then do. After receiving and paying for the pork, plaintiff discovered that it was not mess pork. Defendant upon being informed of this, said he would make all right; but he subsequently refused to refund any portion of the money, and this suit was brought.

Corry and *Pugh*, for the plaintiff, insisted: 1. That a description of goods in an advertisement, sale note, or brand, made by the manufacturer

OHIO DECISIONS.

of Common Pleas, Columbiana County.

o warranty that the goods are of the kind described.
on Cont., 357; 4 Campb., 144; 4 Barn., 2 Cress.,
504; 5 Bing., 538; 2 Pick., 214; 11 Pick., 97;
ss., 139; 12 Johns, 468; 9 Wend., 20; 4 Cowen, 444;

a warranty by description, when the vendor refuses
(4 Car. and Payne, 45; 5 Barn. and Ald., 240.)
or the defendant, contended: 1. That the question
raised in this action. (2 Chit. Plead., 100; 6 Johns,

no implied warranty as to quantity whatever be the
if there is no fraud. (2 Caines' R., 48; 20 Johns
67; 18 Wend., 426, 449; 19 Wend., 159.)

charged the jury in substance as follows:

as sold by sample, there was an implied warranty
ould correspond to the sample.

ufacturer of goods, in making a sale, marks, brands,
se represents the goods to be of a particular kind,
ular purpose, in the absence of all fraud, this is a
ods are of that kind or suited to that purpose, unless
e agree otherwise.

anufacturer, in making a sale, expressly refuses to
nerally, yet falsely makes representations as to their
wing them to be false, whereby the vendee is induced
ination, though he had an opportunity, there is a
ods shall answer the representation.

there was a warranty, the goods corresponded to it,
stion of fact.

ry find for the plaintiff, the measure of damages is
en the value of the article as warranted, and the

eed after eight hours, and were discharged. The
ompromised.

case of *Moses v. Mead*, lately tried before the New
before Judge OAKLEY, as I learn from the news-
that on a sale of provisions even by a commission
implied warranty that they are sound and wholesome.

CRIMINAL LAW.

ommon Pleas, Columbiana County, Ohio.]

HIO V. STEVENS AND EVERETT.

[Reported by C. D. COFFIN.]

mitted on board of a boat on the Ohio river below low water
g attached to the shore, may be punished in the county where

have jurisdiction of offenses committed on that part of the
g on Ohio

committed on the river between Ohio and Virginia, each
nt jurisdiction.

That in an indictment against two for selling one-half gill of whisky, one may be acquitted, the other convicted; that proof of sale by one, at one time, and a sale by the other at another time would authorize a verdict of guilty against both; not necessary to show that they were both engaged in the same act of selling.

At the November term, 1843, of the common pleas of Columbiana county, Ohio, the defendants, Stevens and Everett, were indicted for selling, on the 6th day of October, 1843, at said county, to one Donaghy, one-half gill of whisky—the defendants not being licensed tavern keepers—plea, not guilty. At the August term, 1843, the cause came on trial before a jury. It was proved that Stevens sold to Donaghy a drink of whisky at one time—that Everett sold him a drink of whisky at another time—that the sales were made on a wharf boat on the Ohio river below where the northern boundary line, and above where the southern boundary line of the county strikes the river. The boat was made fast to the Ohio shore by a breast and stern line, and there were gangway planks connecting the boat and shore. The boat was sometimes above and sometimes below low water mark on the Ohio side.

Loomis and Mason, for defendants, asked the court to charge the jury:

"*First*—That to convict the defendants the testimony must establish the fact that the offense was committed in the county of Columbiana.

"*Second*—That the boundary of said county, so far as the same is bounded on or by the Ohio river, extends only to low water mark on the western or northwestern side of said river.

"*Third*—That if the offenses charged were committed on the Ohio river nearer the Virginia shore than low water mark on the Ohio side of the river, the defendants cannot be convicted on this indictment.

"*Fourth*—That if the boat were nearer the Virginia shore than low water mark on the Ohio side of the river, but attached to the Ohio shore by cables, this court has not jurisdiction to punish the act of selling."

Blocksom and Umbstaetter, for the state.

The court, Belden, Judge, charged the jury, that true it was that the defendants could not be convicted unless the testimony established the fact that the offense with which they were charged was committed in the county; but if on board of a wharf boat at the wharf at Wellsville in said county, whether the boat was nearer the Ohio shore of the Ohio river than low water mark or not, the boat being attached to the Ohio shore by a rope and by means of a gangway of planks, the defendants had committed the offense, they were liable and might be convicted under the laws of Ohio. That if the proof clearly satisfied them that the defendants had committed the offense alleged against them on a boat floating on the Ohio river, though unattached to the Ohio shore, between the upper and lower boundaries of the county on the river, they were amenable to the laws of Ohio, and the offense would be within the jurisdiction of the court. That of crimes and offenses committed on the Ohio river, between said boundaries, the states of Ohio and Virginia had concurrent jurisdiction, each state being governed by its own laws in its mode of proceeding and in its inflicting of punishment. 68

That as they should consider the evidence to require, they might convict one of the defendants and acquit one—or acquit both or convict both; and that if the evidence showed that the defendants had separately been guilty of the offense charged against them, though it did not show

OHIO DECISIONS.

me Court of Ohio, Hamilton County.

gether engaged in the same act, they might be

The defendants' counsel excepted to the opinion
ed in the charge. The case has been taken to the
t of error, and at the February term, 1844, of
r Columbiana county, was reserved for court in

CONVEYANCE.

t of Ohio, Hamilton County, April Term, 1844.]

Present, Judges Lane and Wood.

ESSEE OF CARR V. LEHUGH.

[Reported by C. D. COFFIN.]

s of the grantors in the premises of a deed does not render

fee of the real estate in question was traced to Mary
oh T. Williams. The plaintiff's counsel then of-
d from Williams and wife duly signed, sealed, at-
d, which read "Know all men by the presents that
deration of the sum of seven hundred and fifty
and paid by Hugh Carr, the receipt whereof is
hath bargained, etc., unto the said Hugh Carr, his
er, all that tract," etc. (here followed a description
d all the estate, right, title, interest, claim and de-
equity, of them the said Joseph T. Williams and
and to said premises," etc. The deed also con-
arranty on the part of Williams and wife.
for the defendants objected. The paper offered
ere was no grantor—the name of the grantor in
ity not sufficient.

The deed is not defective. Let it be read to the

1 *Miner*, for Plaintiff.

Gwynne, for Defendants.

EVIDENCE.

t of Ohio, Hamilton County, April Term, 1844.]

Present, Judges Lane and Wood.

LLOYD & Co. V. C. M. STRADER.

[Reported by C. D. COFFIN.]

osition referred to an answer in chancery made by him in
e a certified copy of the answer a part of his deposition,
d copy could not be read as a part of his deposition.

n of assumpsit. The counsel for the defendant
f C. T. Reeder. In that deposition the witness

stated that a suit was brought on a note in the Louisville chancery court, that he, the witness, was a party to that suit, had answered, and he annexed a certified copy of his answer marked A, and made it a part of his deposition. The counsel then offered to read the certified copy of Reeder's answer annexed to his deposition, as a part of his deposition. The counsel for plaintiff objected.

BY THE COURT. The certified copy of Reeder's answer cannot be read as a part of his deposition; that method of taking a deposition is not authorized by the statute.

C. Fox, for Plaintiffs.

Wright, Coffin and Miner, for Defendant.

MORTGAGES.

70

[Supreme Court of Ohio, Hamilton County, April Term, 1844.]

Present, Judges Lane and Wood.

LONGWORTH ET AL. V. BONSTALL ET AL.

[Reported by C. D. COFFIN.]

A mortgage may be made to secure a present debt and also subsequent advances. Such a mortgage secures advances actually made upon its faith prior to the receipt of actual notice of subsequent liens, although the advances are made subsequent to the record of a junior mortgage.

This was a bill filed in the supreme court of Cincinnati to foreclose a mortgage.

The bill sets forth a mortgage by J. Bonsall and wife, dated 3d January, 1832, to Lawler, and assignments of same to complainants—also a mortgage by Bonsall and wife to Lawler, dated 25th January, 1831, and assignment of the same to Harbeson, a defendant. The bill alleges that there are other liens upon the mortgaged premises. Davis B. Lawler, Peter Spader et al., were made defendants.

Lawler filed an answer and cross bill exhibiting a mortgage of same real estate by Bonsall and wife to Lawler, dated 25th September, 1832, recorded 11th October, 1832, made to secure certain promissory notes describing them, amounting to \$7,870.00, "and in case any of the above described notes should be renewed, then such renewal notes respectively, and any other sum or sums of money which the said Bonsall may be owing or indebted in, to the said Lawler," etc. The answer and cross bill alleged that payments were made on the notes specified in the mortgage, from time to time, until they were reduced to \$1,832. when they were consolidated in one note for that amount, and by sundry payments reduced to \$215, for which a renewal was had on the 9th November, 1841, by Bonsall giving a note for that sum payable ninety-five days after date; that Bonsall was owing Lawler several large sums of money, evidenced by sundry notes other than those specifically named in the mortgage—that divers payments were made, and renewal of notes had, until the money so owing by Bonsall was reduced to the sum of \$1,008, evidenced by three notes:

1. Dated September 14, 1841, for \$228.
2. " " 28, " " 440.
3. " October 22, " " 340.

All payable ninety-five days after date.

Spader et al. filed an answer, etc., exhibiting two mortgages from

OHIO DECISIONS.

the Court of Ohio, Hamilton County.

same premises; one dated 8th October, 1836, to 8th October, 1836; the other dated 24th July, recorded 31st October, 1838.

term, 1842, of the supreme court of Cincinnati, and finding the amount due to the complainants Harbeson and directed a sale of the premises upon reserving all questions as to the amount and orders.

.843, of that court, a sale of the premises being and proceeds distributed. Amount found to be \$77, being the amount of the \$215 note and the proceeds upon the subsequent mortgages, the court decreed in favor of Lawler. From this decree Lawler appealed to the court. The first lien upon the mortgaged premises held by Harbeson.

mortgage held by the complainants.

mortgage held by Lawler.

mortgages held by Spader *et al.* There were orders by judgments and mortgages to an amount of the proceeds of the sale.

Spader, for Lawler, claimed that the mortgage to him, dated 1832, secured to him future advances to the amount of \$1,008, were advanced to Bonsall after the mortgage to Spader, yet that Lawler by virtue of the mortgage above recited, had a lien upon the mortgaged premises for the \$1,008 and interest, as well as the \$215 note by virtue of the mortgage to Spader; and that he was entitled to the advances made under that mortgage until the amount of subsequent liens; that the debt secured by the mortgage was described in the condition of the deed with sufficient authority to subsequent creditors to ascertain by an *enquiry* into the incumbrance; and what is considered as sufficient notice is considered as conveying notice; and see *Mortgages and Notes*, 533; 10 Pick. Rep., 199; 34, 51; 2 John C. Rep., 809; 1 Peters, 488; 589; 8 Conn. Rep., 219, 392; 7 Conn. Rep., 4 Kent, 175.

Spader, contended that the mortgage to Lawler was to secure future advances; that the clause under which the \$1,008 was advanced was vague and uncertain; that a mortgage did not, except as to the sum of \$1,008, give the requisite information to enable a junior creditor to ascertain the extent of the incumbrance; that Lawler could not claim the advances after the recording of the mortgages to

him, 161; 5 Conn., 442; and 6 Conn., 38, were

the court held the mortgage to Lawler to be a lien for the present debt and also subsequent advances; that it did not give a lien for advances actually made upon its face without actual notice of subsequent liens; that the court decreed for the full amount claimed by him.

-and that the costs be paid out of the proceeds

GUARANTY.

78

[Erie County Court of Common Pleas, October Term, 1844.]

THE BANK OF SANDUSKY V. ORAN FOLLETT.

[Reported by Judge BOWEN.]

Where one guarantees the ultimate payment of a debt and costs, the meaning is that the principal is to be prosecuted to the last resort of the law.

Covenant on an instrument in writing in the following words: "Whereas, the bank of Sandusky has this day discounted, for the benefit of Henry D. Ward, of Buffalo, the following promissory notes, viz: E. A. Huntly & Co's. note, endorsed by Kemball & Haddock, and J. R. Harrington, due July 5, 1837, for \$1,000. Levi Chappoting's note, endorsed by Benj. Dale, due July 5, 1837, for \$300. A. H. Scovill's note, endorsed by Jas. L. Barton and G. V. Moonery, due 13th July, 1837, for \$500. John W. Beall's note, endorsed by Wm. C. Miller & Co., due 4th August, 1837, for \$290. Now, therefore, for the consideration of one dollar, to me in hand paid, I do hereby *guaranty the ultimate payment* of all and each of the above described notes, together with all costs, charges, and interest properly accruing thereon, or on any and each of said bills.

"June 24, 1837.

O. FOLLETT." [SEAL.]

The declaration contained four counts. The first, after reciting the above instruments, averred that said notes were presented to the makers, at the times and places the same fell due, and payment demanded of them, and refused, of which notice was given to the endorsers, and to the defendant. That the notes were protested for non-payment, by means whereof the plaintiff was put to cost, expenses, etc.

The second count averred that the note given by E. A. Huntly & Co., and endorsed by Kemball & Haddock and J. R. Harrington, was presented to the makers for payment at the time and place when and where the same became due and payable, and payment was refused; and thereupon the plaintiff caused said note to be protested for non-payment, and notice of such demand and refusal to be given to the endorsers of said note, and to the defendant. That after the notes so became due, the plaintiff commenced a suit in the supreme court of the state of New York, against maker and endorsers, and recovered a judgment against the maker and Kemball and Haddock at the January term of said court, 1840, which judgment remains unpaid; of all which defendant had notice. There was the same averment as to the note of Levi Chappoting, except it was not averred that any suit had been commenced thereon. Similar averments were made as to the note of A. H. Scovill, and that a judgment was recovered in the same court, at the January term, 1839, with the additional averment that plaintiff caused a writ of execution to be issued to the sheriff of the county of Erie, in the state of New York, commanding him to make the amount of said judgment of the goods and chattels, lands and tenements of said makers and endorsers, which writ was returned by the sheriff, that he could find no goods, nor chattels, lands nor tenements, or chattels real in his bailiwick, to satisfy said execution. The same averment as the last, then followed, as to the note of John M. Beall, except it was averred that judgment was recovered on his note at the January term, 1838,

against maker and endorsers. The count then avers that the maker and endorsers of said notes *are insolvent*, and that plaintiff is unable to collect either of said notes or the damage sustained, etc.

The third count is substantially like the second, setting out more fully, the names of the makers and endorsers of the notes, and the places where they were payable, and when the demand of payment was made, and an averment, as to bringing suit, as follows: "And the said plaintiff further avers that he had caused suits to be commenced against all of the makers and endorsers of the notes, described in this count, except the notes described as having been made by Levi Chappoting and endorsed by Benj. Dale, which suits have been prosecuted to final judgment, and executions have been issued thereon respectively, all of which have been returned by the sheriff to whom the same were directed, that the several defendants had no goods, nor chattels, lands nor tenements, whereon to levy, to satisfy said several judgments in said executions described." It is also averred, in this count, that the makers and endorsers of said notes are insolvent.

The fourth count is, substantially, like the first.

The defendant demurred, and assigned for cause of demurring to the first and fourth counts, that it does not appear that any suit was prosecuted against any of the makers or endorsers of said notes.

To the second and third counts, the causes of demurrer assigned are—

1. No suit was prosecuted to judgment against J. R. Harrington, one of the endorsers on the note made by E. A. Huntley & Co., nor is it shown that Harrington is unable to pay the note.

2. Because it does not appear that any execution has been issued upon the judgment recovered on said note.

3. Because the legal proceedings instituted on some of the notes mentioned in these counts, are not set forth with sufficient certainty.

80 *Reber and Camp*, argued in support of the demurrer, and relied mainly on the point, that the terms of the contract made by the defendant, require of the plaintiff to exhaust every remedy, by judgment and execution, against the makers and endorsers of the notes, before they can call on him for payment. They cited 11 O. R., 102; 2 Hill R., 139; 14 Wend. R. 231; 19 J. R., 69.

Parish & Sadler, and *Beecher & Cook*, for plaintiff.

BY THE COURT, BOWEN, J. Follett's undertaking was that of a surety. He chose not to occupy the place of a common endorser. But he agreed with the bank, if it would discount the notes for Ward, that the makers and endorsers thereof should pay the same, and if *ultimately* the bank failed to make collection of them, he was to pay the same with costs. The only consideration to induce Follett to lend his name, was the obtaining by Ward of the money. Believing that the makers and endorsers, some or all of them, could be made, by proper diligence, to answer for their undertakings, and to pay the amounts of the several notes, Follett, as surety that they should do so, undertook that in case of their failure, in the last resort to pay the money, he would do it for them. This is, to our comprehension, the plain purport and meaning of the contract. To give to it this construction requires that the words used, have their ordinary significations. The term *ultimate payment*, can mean nothing less than payment in the *last resort*. Every thing connected with the contract, and which arises upon the face of it speaks for it this interpretation, and viewed in this light it is a reasonable con-

tract, one that a party, standing as Follett did, would be more likely to enter into than any other, and the only one which the bank, if actuated by proper considerations, could, with much propriety, exact.

This view of the case disposes of the first and fourth counts of the declaration. It remains to see whether there is sufficient matter averred in the second and third counts to sustain the action.

The condition attached to Follett's undertaking we have seen, was that he would be responsible if the plaintiff diligently pursued the makers and endorsers without effect. The notes were, at the date of the covenant, within a few days of maturity. Both the bank and Follett must, at that time have treated the makers and endorsers as sound and able to pay, and it is not, we think, assuming too much to presume they were so. Their circumstances changed, as time elapsed, until they became insolvent. If the bank stood by and permitted such change of circumstances to happen, before attempting to enforce payment of the notes, it is clear that Follett would be discharged. No liability could, in our opinion, attach to Follett until the bank had, timely, and without delay, employed the means pointed out in the contract to compel payment from the different parties to the notes. This would require not only the obtaining of judgments, but the issuing of executions, or the averment of a satisfactory excuse for not doing so. There was no authority on the part of the plaintiff to permit a term of the court to intervene before bringing suit, after the debts were due, nor to permit any time to intervene without issuing execution. The plaintiff accepted the contract from Follett, with this condition attached to it. In declaring upon it, therefore, it is incumbent on the plaintiff to allege, with certainty, as to time and place the performance of every duty imposed upon it, as a condition on which its right to maintain this action depends. The second count is defective in this respect. The court cannot determine, by inspections of it, whether the bank has used proper diligence or not. As everything is to be taken most strongly against the pleader, the inference is, that it has been negligent, and rested inactive too long. No time is averred when any one of the suits was commenced, nor does it appear at what time any of the executions issued, nor is it shown *when* the parties to the note became insolvent. The third count is still more defective in all these respects, than the second. Its averments are general. There is no certainty as to any of the *legal* proceedings therein mentioned. The objections to these two counts are to the *form* of them, only, and the declaration may, if the facts warrant it, be so amended as to remove the present objections.

Demurrer sustained.

LOST INDICTMENT.

[Court of Common Pleas, Hamilton County, Ohio, July Term, 1844.]

[Hon. Wm. B. Caldwell, presiding.]

THE STATE OF OHIO V. JOHN MOUNT.

[Reported by R. B. WARDEN.]

Where a verdict of guilty has been rendered on an indictment for a penitentiary offense, and the indictment has been lost or stolen before sentence, the verdict

- may be set aside, a *nolle prosequi* entered, and the prisoner may be again indicted and tried.

This case was one of unusual interest, from the general expectation that the novel question, arising in most of the cases in which convictions were had at the July term, would, on the trial of this particular cause, be fully argued and determined. The state of fact out of which the question grew, was as follows: After several of the persons indicted for penitentiary offenses (among whom was John Mount), had been convicted, and before the time set apart by the court for the purpose of sentencing them had arrived, the desk containing the indictments of the term was broken and entered, and the indictments 82 were stolen. (a) The business of the term was thereupon suspended, until a new grand jury could be impaneled, according to the provisions of the statute of last winter. That grand jury afterwards reported bills against John Mount, and others, previously convicted, as above stated. The court set aside the former verdicts, and the prosecuting attorney entered a *nolle prosequi*. In several of these cases, the question was made, whether the prisoner could be placed on his trial a second time; but the case of Mount was the only one in which the point was argued at any length. It is a matter of regret with the reporter, that he preserved no notes of the arguments; perhaps, however, the principal grounds assumed may be gathered from the charge of the court.

Brough for the state. *D. Piatt* and *Pruden* for the defense.

The opinion of the court was delivered by Judge CALDWELL, in substance as follows:

There appears to be an unusual conflict of authorities, in the cases to which the attention of the court has been called. In the case in 2 Sumner (*U. States v. Gibert*), the question arose on a motion for a new trial, the case being capital—and Judge STORY does no more than recognize the common law doctrine, which, as it is said, is merely reasserted in the constitution. This common law rule applies, it is true, to all cases in terms, but in the decisions there has always been a discrimination between capital cases and mere misdemeanors. Judge STORY appears to take this distinction, though not in specific terms; and his decision applies to capital cases only. The objection to the grant of a new trial is founded on the constitutional provision; and the state and the defendant have the same rights, and are under the same disabilities. Whether the verdict be of acquittal or conviction the same rule applies; for, in either case, the jeopardy exists. If the constitutional rule operates against the grant of a new trial, on the application of the state, it must with the same force operate against the motion of the defendant. The prisoner could not consent to a trial, as against an unqualified and absolute constitutional provision; for this would be to employ the court in the trial of a cause, not only without warrant of law, but directly against the constitution of the land. The court are well satisfied, that the decision in Sumner can apply only to capital cases,

(a). It may not be improper to state, that the indictments had been kept in the same manner and in the same place (unless when needed for some purpose in the clerk's office), for many years past—as far as the writer knows, they were never kept in any other place, except as above stated, in case of necessity. They were carefully put away on Saturday, July 27th, and their loss was not discovered until the succeeding Monday. In this case of Mount, the counterfeit notes, for passing which he stood indicted, were filed away with the indictments, and, of course, were taken at the same time.

and the rule as to new trials is also limited to them. The plea filed in this case sets up that the defendant has been already tried on a certain indictment, for the same offense charged in the present indictment, and thereon convicted, etc. The replication sets forth, that there is no such record, etc., and states the facts in the case as to the loss of the indictment, the setting aside of the verdict by the court, and the *nolle prosequi* entered by the prosecuting attorney in the other case. The whole matter is now submitted to the court on demurrer to the replication, and the question left for consideration, is substantially, whether the court had the right to set aside the former verdict, and if so, whether the defendant could again be put upon his trial. It is certain that the court would never try a man a second time in a case wherein a verdict had been rendered, whilst that verdict remained in force. But, in this case, the verdict had been set aside, and a *nolle prosequi* entered. Had the court a right to set the verdict aside? It was a matter of necessity, and it was demanded by regard for the rights of defendants, and the due administration of justice, that the verdict should be set aside. It was impossible for the court to proceed. Suppose the finding of the jury to be guilty on a particular count, or as indicted. There is no indictment before the court to fix the offense for which they are called upon to pronounce the sentence of the law. The matter stands precisely as though there had been no indictment—the court could act in one case with the same propriety as in the other. *There is no indictment to sentence upon.* If there never had been an indictment, the verdict would be, for all legal purposes, a mere nullity—so it is in the present case. In the case of *Hurley v. The State*, 6th Ohio, 399, there could have been judgment so far as the indictment was concerned. But there was error in the verdict. The court set it aside. Why? The proceedings were regular up to verdict; the error was in the verdict. The case was capital, and, therefore, the decisions may appear to clash with that of Judge STORY. But there is enough in the action of the supreme court of Ohio in that case, to satisfy this court of its power to act in the premises; and that it is perfectly correct to set aside the verdict in a case like the present, although not called upon to grant a new trial, from the very consideration which influenced them in setting aside the verdict, namely, the want of an indictment. And the court are the better satisfied with this mode of proceeding, from the conviction that it can work no injury—the former verdict, being, without the indictment, a mere nullity, and, from the impossibility of any action upon it against the prisoner, subjecting him to no jeopardy.

Ordered, that the demurrer to the replication be overruled, and that the defendant do answer over to the said indictment.

A plea of not guilty being entered, the case went to a jury. Verdict *not guilty*.

[Remarks on the above case by P. McGROARTY.]

The novel question presented in the case of Mount, reported above, was necessarily disposed of without allowing to the court and counsel full time to examine the authorities, and to weigh all the arguments; indeed the decision was one almost of necessity; for the court of common pleas, being of inferior jurisdiction, could hardly assume the responsibility of turning loose upon the community a band of convicted felons, while a single shadow of doubt remained as to the correctness of such a course. If our court erred they erred on the side of prudence. A writ of error has been taken which will bring the matter

under the revision of the supreme court, when the question will be definitely settled; while, had the decision of the common pleas been other than it is, there would have been no way of bringing the question before the supreme court. The object of this article is to examine the position of the court is supported in its positions (as they are reported), by the law.

The first ground taken by the court is, that the verdict at the former trial is null and void, because it is impossible to proceed to judgment; that the indictment upon which the verdict was founded is lost, the verdict is null and void, the court having nothing upon which to predicate the verdict in consequence of the wording of the verdict, "guilty as charged" or "guilty on the first or second count," it is impossible for the court to say of what crime the prisoner has been convicted, without an indictment before them; and consequently they cannot apportion the punishment. For these reasons they say the verdict is to be set aside. A distinction is made between granting a writ of *habeas corpus* and setting aside the former verdict, for in all these cases a writ of *habeas corpus* was entered on the lost indictments, and the defendants were re-arrested and arraigned anew, so that the court did in effect nullify the verdict by a new action in relation to all who were convicted at that time. This brings up an exceedingly grave question, whether a court can set aside a verdict in a criminal case, after verdict, when there has been no irregularity in the proceedings, no error in the charge, no defect in the verdict itself, and no evidence discovered, go back upon its path and set aside, *nullify* the verdict in the case. Never before in the whole history of courts of law or the common law, as far as the writer knows, has such a power been exercised or claimed; and fortunately for the citizen no such power; for otherwise our lives and liberties would be in the hands of the judges. If our court could set aside the verdict in such a case as to prevent them from doing it where the prisoner was convicted.

The reasoning will apply as well to the one case as to the other, because an indictment is lost or mislaid the court can make a new indictment of everything that has been done in the case, from the finding of the verdict, it is in the power of a malicious prosecutor, or a faithless juror, to harass any of us with trial upon trial for the same offense. The verdict of a jury, which we have been taught to regard as the safeguard of our liberties, the verdict for which magna charta was secured, and an unwilling tyrant, the verdict for which the American Revolution was accomplished, is of no avail to protect the citizen; and the struggle for a shadow not a substance, if courts can set aside a verdict whenever it appears to them expedient so to do. Tyranny would never desire a surer nor a safer engine of power than this discretionary power over a verdict in a court. If the court discovered this easy way of *securing* a verdict (for it is a means to secure a verdict) by the regular trial, much of the odium that now attaches to his name would be avoided, for how could he help it, if an indictment or offense was *lost* or *stolen*. His master might have died upon the gallows and himself peaceably in his bed, had this been the case in England.

Our court this verdict is a *nullity*, and why? Because the verdict upon which it is predicated is lost. Logicians, we fear, will say this with "*non sequitur*." It is true that judgment cannot be rendered without the indictment, but the verdict is still a verdict, it

was received by the court as a verdict; so long as the indictment was accessible it was a verdict; and the loss of the indictment cannot make it no verdict. Even the common law cannot make something, nothing. Had the indictment been bad, then would the verdict be a nullity; because it never was a verdict; but it is little less than absurd to say that the loss of an indictment which was in itself good and sufficient, can produce the same result. The verdict of a jury upon a sufficient indictment must be taken as true, and the constitution provides that such verdict can be reviewed only according to the forms of the common law. Now the common law grants new trials only when there is reason to believe that the verdict should be other than it is. Such a state of facts is not pretended to have existed in any of these cases. But something must be done and what is it? The cause of the difficulty indicates the course to be pursued. Judgment cannot be given; then the judgment *must be arrested*. The grounds for arrest of judgment are errors apparent on the face of the record; here is a glaring error for the record shows no indictment. The case is thus brought within the very letter of the law.

If the reasoning of our court be supported, it will apply as well after as before sentence. The verdict say they, cannot exist without the indictment; if the one be lost, the other is a nullity. If then, after sentence, the indictment be lost and the record destroyed, or if the indictment be lost before a record has been made, the sentence must be a nullity too, and if the reasoning be correct and the law be as our court has ruled, the convict must be brought back and be tried over again on a new indictment. Had this view of the case been presented to the court, the length to which their doctrine might be legitimately carried would doubtless have startled them; but it was not, and the court themselves did not look so far. There were several convictions for petty larceny upon which sentences were pronounced, and the convicts are now undergoing their punishment, when the verdict is, say our court, a *nullity*. 80

The constitutional question involved in this case is one of the most interesting that has ever come under the consideration of our courts: What is the extent of the guaranty of personal liberty? What is the meaning of the clause in the constitution of the United States, which says, "Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb;" and of that other in the Ohio constitution, "nor shall he be twice put in jeopardy for the same offense?" These two provisions, though somewhat differently expressed, are identical in meaning, for, as the supreme court of New York say, in the *People v. Goodwin* (18 John, 187), the expression "jeopardy of limb" refers to those crimes which in ancient times were punished by dismemberment; it is used in reference to the nature of the offense, and not to designate the punishment. This then being taken as admitted, we come to the question, what does this word "jeopardy," as used in the constitution, mean? On this subject we have several decisions. I will first consider the case of *Hurly v. The State*, 6 Ohio, 399. In this case the jury found the prisoner guilty on one count of the indictment, but could not agree on the others, the court decided that a verdict must be taken as a whole thing, and that a return by the jury of a verdict which does not pass positively on the whole indictment is in fact no indictment at all, and that when a jury cannot agree upon a verdict they may be dismissed and the case continued: a decision in

DECISIONS.

Pleas, Hamilton County.

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on that would shock the common sense

But, say our court of common pleas, we are well satisfied that the decision in Sumner relates only to capital cases, and the rule as to new trials is limited also to them; now what there is in the case of Gibert to satisfy the court of this I confess I cannot see. The court is settling a grave constitutional question, and the main points for their consideration are, what does the constitution mean when it says no man shall be twice put in jeopardy? And what is this jeopardy? The court settle these questions by deciding, first, that the meaning of the clause is that no man shall be twice tried for the same offense; and secondly, that jeopardy in the constitutional meaning attaches upon the rendition of a verdict, which verdict cannot be set aside. And this decision is confined to capital cases only because a capital case was then before them. But let any man read the opinion of the court with an eye to the reasoning, and he will find that it is equally strong in case of a felony to which a less punishment than death is attached. If the words "jeopardy of limb," mean anything, they must be taken as describing all cases in which a man incurs the danger of a punishment less than loss of life. But in the constitution of Ohio, we have no such clause, the words are, "nor shall he be twice put in jeopardy for the same offense," than which nothing can be broader, nothing more comprehensive. If the constitution had specified every act forbidden by the municipal law 88 under a penalty, it would have said no more than it does now. If our court acknowledges the authority of the case of the *United States v. Gibert*, in a capital case, the reasoning must inevitably establish that in every criminal case in Ohio, the verdict of a jury is final and irreversible.

In support of the above opinion I would also quote *The Commonwealth v. Cook*, 6 Serg. and R., 577; Story's Commentaries on the Constitution, 659; and 4 Black. Com., 336.

There is a curious case reported in 2 Chandler's American Criminal Trials; the case of Hauer and others, in which a jurisdiction somewhat similar to that claimed by our court in this case, was exercised. It was a trial for murder in Pennsylvania, and one of the defendants while upon his trial, after part of the case had gone to the jury, requested to see the judges in his cell. The judges went to him, and he then confessed that he was guilty as accessory before the fact, but denied being the principal. The judges came into court and directed the jury to be discharged, and a new indictment to be framed to suit the confession. The prisoner was tried and convicted.

Comment on this case is useless since it will strike every person as a monstrous violation of law and decency, and yet if the court has power to set aside the verdict of the jury, and to allow a new trial, who shall say it has not power to dismiss the jury during the trial and order a new indictment?

Since the above was written I have seen in the newspapers an account of the trial of the crew of the *Salidin* for piracy. The jury there disagreed as to two of them. A new jury was impaneled immediately, which was instructed by the court at the suggestion of the attorney-general, to acquit them without hearing evidence. This was at Halifax, Nova Scotia.

123

CRIMINAL LAW.

[Court of Common Pleas, Hamilton County, Ohio, October Term, 1842.]

ANDREW LATSHAW'S CASE.

[Reported by JOSEPH COX.]

A magistrate has no authority to require a witness in a criminal case to enter into recognizance *with security* for his appearance at court, and in default thereof commit him to jail.

His own recognizance is all that the statute requires; and if he refuses to enter into this, he may be committed for contempt.

But if committed merely because he does not obtain security, he will be entitled to the same fees per diem as if in actual attendance at court under recognizance.

In August, 1843, Andrew Walton and Jack Dement were arrested on the charge of having murdered John Carrel, in this city. An examination was held before the mayor, who committed both defendants to jail to appear at the October term of the court of common pleas, to answer to the charge of murder in the first degree. Defendants elected to be tried in the supreme court, and Walton was found guilty, and sentenced to be executed; but this sentence was afterwards commuted to imprisonment for life. Latshaw was a material witness on the part of the state, without whose testimony it was supposed, the charge could not be sustained. Being a transient person, the mayor ordered him to enter into recognizance *with security*, in the sum of one hundred dollars, for his appearance at the next term of court. This security, he was unable to obtain, but was perfectly willing to enter his own recognizance. He was therefore committed to jail, where he remained from the 25th of August until the 27th of October, when upon application being made to court, a writ of *habeas corpus* was issued, commanding the sheriff to have the body of the applicant, together with the cause of his caption and detention, before the court on the next day. At the time specified, the sheriff, in compliance with the writ, produced the applicant, together with a copy of the mittimus of the mayor, which set forth the failure of the applicant to enter into recognizance, with security, as the ground of commitment.

124 On the part of the applicant it was contended, that the mayor having the same authority in such cases as a justice of the peace (Swan's Statutes, 946), must pursue the statute which regulates their mode of proceeding (Swan's Statutes, 537). This provides that it shall be the duty of every justice of the peace, to recognize the witness or witnesses by him examined on behalf of the state, and whose testimony he may consider necessary in the further prosecution of the charge, to be and appear before the court on the first day of the term thereof next to be holden in and for the county where such recognizance was taken. Now the justice is empowered either to commit, discharge, or cause the party accused to enter into recognizance with security (Swan's Stat., 537, 544); and in default thereof he may undoubtedly commit. But no such provision is made in relation to witnesses. He is merely ordered, if he think necessary, to cause the witness to enter into recognizance for his appearance, and wherever the statute contemplates any other security than the mere personal recognizance of the party sought to be bound, it expressly declares it. (Swan's Stat., pp. 538, 539, 250, 726.) This applicant was not therefore bound to give security, and the officer had no au

thority to commit him for failure to do so. He doubtless had the power to commit him had he refused to enter into the recognizance; but could not when he was willing, but was unable to find security to join him. (4 Bla., note 4).

On the part of the state it was contended that the form of recognizance to compel the appearance of witnesses on the part of the state (Statutes 545), was sufficient authority for the mayor to order the security, and in default thereof, to commit; and that any other interpretation of it would tend to prostrate the ends of justice, by taking away all power to compel the attendance of witnesses in criminal cases, who resided without the jurisdiction of the state.

CALDWELL, P. J. There is nothing in the statute authorizing the officer to demand the security. All he can do is to require the witness to enter his *own* recognizance. If he refuses to do this, he may be committed for contempt. Let the applicant be discharged on his own recognizance of \$300, for his appearance at the next term of the supreme court.

A motion was here made to allow the applicant the usual fees of witnesses residing out of the county, attending court in criminal cases, under recognizance. But the court held that his detention being illegal, he must look for a remuneration to those who caused it.

The same motion was subsequently made at the April term, 1842, of the supreme court—Judges WOOD and READ on the bench. They held, that as he had been in the custody of the sheriff, which is really a stronger compelling power than a recognizance; and in the meantime had shared the same fate with the accused, it was proper that this court should grant him some remuneration for the suffering he had undergone; and they directed the clerk to make out a certificate for his fees, at the rate of one dollar per day, for the period he was in confinement.

Jos. Cox, for Applicant. *J. T. Crapsey*, Prosecuting Attorney 125
for state.

INSOLVENT DEBTORS.

[Superior Court of Cincinnati, October Term, 1844.]

C. FOSTER AND C. J. WRIGHT, ASSIGNEES OF W. R. FOSTER, A BANKRUPT, v. THOMAS T. BAINBRIDGE.

[Reported by J. FRAZER.]

Held, That the assignee of a bankrupt may sue in a state court if he so elect.

This was an action of assumpsit, and there was a plea to the jurisdiction of the court.

Frazer, for defendant, contended that as the jurisdiction of the district court shall extend to *all* cases and controversies in bankruptcies, arising between a creditor and the bankrupt, and between such creditor and the assignee; and as the circuit court has concurrent jurisdiction with the district court, a state court has no jurisdiction, which by the act is conferred exclusively upon the U. S. courts. (See Bankrupt act, sections 6 and 8. *McLean, Assignee etc., v. Lafayette Bank*, 1 W. Law Jour., 15.)

Storer and Gwynne, for plaintiff. C. Foster had a right to bring the suit in this court and could not be deprived of that right by the bankruptcy of W. R. Foster.

ESTRÉ, Judge. The suit is well brought. The jurisdiction of the circuit and district courts of the United States, is exclusive where the assets of the bankrupt come into court for distribution; but not in a suit brought by the assignee to collect money due to the bankrupt. He may exercise his option to sue in either of the courts; otherwise the assignee would have to resort to the U. S. courts for the recovery of a claim of twenty dollars or less, which would certainly be far from the meaning of the act. The demurrer is sustained and defendant has leave to plead further.

183

GIFTS CAUSA MORTIS.

[Seneca County, Ohio, Court of Common Pleas, November Term, 1844.]

FERDINAND MEYER V. SUE SHANEY ET AL.

[Reported by JUDGE BOWEN.]

Where one claims a gift *causa mortis*, the proof of the gift must be clear and positive; and if that gift be a promissory note, the remedy is at law, not in chancery.

Bill in Chancery. The complainant was married to Mary Shaney in February, 1841, who, in August of the same year, died intestate and without issue. On the 7th of February, 1840, Mary loaned to her brother, Sue Shaney, the sum of \$119.83 and took his note therefor, payable to herself, or order, in three years from date, with interest. During the coverture, Mary retained possession of the note, and no right or property over it was asserted by the complainant.

The bill sets up that in the last illness of Mary, she "of her own free will, voluntarily gave and delivered to complainant, without his request or solicitation, the promissory note, to have and enjoy it as the property of complainant, provided she did not recover from her then illness."

Sue Shaney has answered, and denies the gift from Mary to her husband; claims to be entitled to the note as heir of his sister, and by way of defense, urges the want of jurisdiction in chancery over the subject matter, insisting that there is adequate remedy at law. No administration has been granted on the estate of Mary.

Cowdry & Wilson, for Complainant; *Williams* for Defendant.

BY THE COURT. The deposition of Shidinger is the only proof taken in the case. He heard Mrs. Meyer say she wanted to know whether it was necessary to make a will—that "Meyer had so much trouble with her, she wished to will him her property," etc. Meyer went down street to make inquiry whether a will was necessary, and was told it was not. This does not sustain the allegation that the wife gave to complainant the note.

Upon other grounds, however, it is equally clear that this bill must be dismissed. The only right which the husband has in the property of the note is to collect it as his wife's administrator. If he would apply for letters he could be entitled to obtain them, and in his character of administrator, to sue for and collect the money for the benefit of the

creditors and heirs of his wife. The brothers and sisters of the wife who dies without issue, inherit her estate both personal and real, before the husband. Statute p.p. 287, 288. Swan. S., 1st Ed. 333. By the statutes of England, and of several of the states of this Union, a different rule is established, and hence it is that the cases, in their reports on the subject, assert the doctrine to be that the right of administering secured to the husband draws to it the right of property, choses in action, etc., of the wife; that the one is incidental of the other. *Betts v. Kempton*, 2 Barn. and Adol., 273; Story on Bills, section 93; *Whitaker v. Whitaker*, 6 J. R., 112. But if the complainant were entitled to the proceeds of the note, according to the rule of the English law, he is not at liberty to prosecute his claim in chancery. This court has no jurisdiction of the cause. He has a plain remedy, by procuring the appointment of administrator, and then, if necessary, to institute his suit at law. He might, by a decree given for him in this proceeding, exclude the creditors of his wife from the payment of their debts against her, or, at any rate, render it more difficult than the law intended it should be for them to obtain their dues. In all the cases referred to in the English books, the husband is required to assume the character of trustee, first for the benefit of all creditors of his wife, before he can derive any benefit from her estate, and this is effected by virtue of his office of administrator. For all of these reasons, the bill must stand dismissed.

PLEADING.

213

[Court of Common Pleas, Hamilton County, Ohio, November Term, 1844.]

STATE, FOR USE OF COMMISSIONERS OF HAMILTON COUNTY, v. J. W. PIATT ET ALS.

[Reported by PETER ZINN.]

Demurrer—Right of county commissioners to maintain suit—Sufficiency of averments in declaration.

This is an action of debt, brought upon defendant's official bond as clerk of the court of common pleas. The declaration contains three counts. The *first* sets out the bond and condition, that Piatt should truly and faithfully pay over money that might be received by him in his official capacity, discharge the duties of his office faithfully and impartially, etc.—avers his appointment, delivery of bond, approval and deposit with the county treasurer, and that he entered on the discharge of his duties as clerk on the 17th of March, 1841, and so continued until February, 1844—that during that time \$966.26 was received by said Piatt in his capacity as clerk, being fines, fees and costs in suits heard and determined in said court, specifying each case by name of plaintiff and defendant, and the amount received in each—that the same were payable into the county treasury, and of right ought so to have been paid. The *second* count is similar, except that it states the amount of fines, etc., in gross. The *third* alleges that in a certain suit by the state against said Piatt he accounted for the sum of \$966.24, as fines, etc., received by him as clerk, which were payable into the county treasury. The non-payment was alleged as the breach in each count.

To this declaration the defendant demurred, generally and specially, and set forth the following causes:

1. That the declaration does not show that the commissioners had been so injured as to invest them with the right to sue for the sum named therein.

2. That it is nowhere averred that the indictments wherein the fines, etc., accrued, were determined in favor of the state, and were of right the property of the county, and that the commissioners had a right to sue therefor.

3. That it was nowhere alleged for what class of offenses the fines, etc., were assessed or collected.

4. It was nowhere alleged that Piatt was a qualified officer under the law, and that said money was received after such qualification, and came into his hands as clerk *de jure*.

5. That it was not averred that the cases were matured into judgments, or assumed such form, that these moneys could be collected by an officer in his capacity as such.

Messrs. *Morris* and *Corwine*, in support of the demurrer, made the following points:

1. That the court should be judicially informed of the interest of the county commissioners, and it should appear in what particular they were injured. *Wright's Reports*, 663.

2. That the county commissioners were a body corporate, of limited powers, and that the statute nowhere giving them *specifically* the right to sue in the present case, they could not sue. *Swan's Statutes*, 205.

3. That this suit should have been brought for the use of the county treasurer instead of the commissioners. [Counsel cited the statute prescribing the duties of the treasurer, and the various provisions directing the fines, etc., to be paid *into* the county treasury, and *to* the treasurer.]

4. That an averment in which class of offenses these fines, etc., accrued, was necessary, because as defendant's counsel contended, in some cases the fines are payable into the state treasury, *Swan*, 254; and in such cases the state treasurer alone can sue.

5. Piatt was not clerk *de jure*, so as to bind his sureties for defaults without *first* being sworn, as the law requires this qualification *before* he enters upon the discharge of his duties, *Swan*, 32, 223; and this provision was made for the benefit of his sureties as well as the community. 1 *Bibb R.*, 214; 5 *Mass.*, 426; 9 *East.*, 250.

215 6. As this action is predicated upon the statute, it is necessary to conclude with the averment "contrary to the form of the statute." 2 *Chitty's Pl.*, 495; 1 *Saund. R.*, 135; 13 *John's R.*, 428; *Archbold Pl.*, 156.

Messrs. *Brough* and *Zinn*, for plaintiff, contended:

1. That the commissioners are the legal representatives of the county, with general powers to sue and be sued; that they must be sued when a recovery is sought against the county, and *vice versa* when the interests of the county are affected. *Swan*, 205.

2. That the strict rule in relation to the powers of private corporations does not apply to a *quasi* corporation, erected for public purposes; and the powers given by the statute necessarily *imply* the power to bring this suit. [The various provisions giving the commissioners supervision over the county funds, and the manner of their disposition,

were cited ; also the following cases as recognizing their implied powers: *Commissioners of Brown Co. v. Butts*, 1 Ohio R., 449; *Commissioners of Trumbull v. Hutchins*, 11 Ohio R., 371; *Reynolds v. Commissioners of Stark Co.*, 5 Ohio, 205.

3. That the practice in this state has been for the commissioners to sue where the rights of the county are affected ; and this practice has heretofore remained undisputed, so far as the power of commissioners is concerned. *Commissioners of Clermont County v. Little*, 3 Ohio R., 289; *Commissioners of Scioto County v. Gherkell*, Wright R., 494; *Smith's Adm'rs v. Commissioners of Licking Co.*, 1 Ohio, 427; *Ohio, for the use of Commissioners of Guernsey Co. v. Findley*, 10 Ohio, 51.

4. That the county treasury is merely the depository of the county funds, the controlling interest being with the commissioners, and the statutes directing these fines, etc., to be paid into the treasury, gives the commissioners power to enforce the payment by suit.

5. That the interest of the county can be shown on the trial, and it is not necessary to be more particularly specified in the declaration. *State, for use of Ex'rs. of Spencer v. Coffee*, 6 Ohio, 151; *Chumlin v. Westlake*, 2 Ohio, 25.

6. That the allegation that the cases were "heard and determined," shows a final disposition of the cases, and that the rights of the parties were fixed, and Piatt's duty was the same whether judgment passed or not.

7. That it is unnecessary to allege the *class* of cases in which the fines, etc., were collected, because in the absence of express provisions, all unclaimed fees, costs and damages are payable into the county treasury. *Swan*, 402.

8. That the sureties would be liable on the bond, although Piatt may not have been sworn as clerk, because the statute is *directory* to the officer ; and that these objections are too late after the incumbent has enjoyed the perquisites of office. *State v. Findley*, 10 Ohio R., 58.

CALDWELL, J., delivered the opinion. The act creating the county commissioners, *Swan*, 205, gives them general powers to sue and be sued ; and the subsequent specification in the same section of particular cases in which they shall have the right to sue, does not include the present case. But these specifications do not impair the general power given in the first clause of the section. Private corporations are erected for private and selfish ends, and the rule confining them strictly within their powers does not apply to *quasi* corporations, erected for public purposes. The different decisions recognize the implied powers of the commissioners, and they having a general supervisory power over all the county funds, etc., and being made the legal representatives of the county, if they could not sue there would be no remedy in the present case. The county treasurer is not made a body corporate, and he has no general power to represent the interests of the county. The allegations that the fines, fees and costs were collected in the cases named, and that they were payable into the county treasury is sufficient. It matters not whether judgments were rendered or not—the allegation that they were determined, shows a disposition of the cases—and the statement that they were payable into the county treasury, precludes the supposition that they were payable into the state treasury. The case in 12 Ohio Reports, 58, decides that it is unnecessary that the officer should be sworn in order to bind the sureties. The last position

by the law. When there is no neglect, no delay, but a disposition manifested to commence the duties of the office within the legal term, and this most manifestly known and well understood by the commissioners; when the elected has done all in his power, pursued his office with unceasing pertinacity, and his bond is not approved because he has followed the directions of one of the commissioners, they ought not so to construe the act as to *nullify* the declared will of the electors of the county.

Is there anything in this section to prevent its receiving that liberal and equitable construction, which is ever extended to all others of like character? Suppose the absence of the commissioners from the
251 county; their sickness and inability to act until the *second* day of March; sickness or accident in the person elected; shall the commissioners *vacate the office*, because unavoidable necessity, or the act of God has prevented the auditor elect from presenting his bond, until the *first day of March*?

This case is, however, much stronger for the defendant. His bond *was* executed, in all things, conformably with the statute; the oath was indorsed upon it; the commissioners did not object to it for insufficiency, but their acts show they considered it sufficient; the defendant was *required* by one of the commissioners to deposit it with the county auditor, and he did so *before the first of March*, and it is admitted he remained at the office with it until the 5th of March, claiming to have the bond approved, and then to be recognized as auditor. The bond is now lodged with the county treasurer, and it is of little moment by whom or how it was deposited. It is the county's security for the faithful discharge of the duties of one of its officers, and we cannot be led to the conclusion, that the *time when* it was executed is of any importance, as to its validity.

We think we are warranted, in our construction of the statute, by adjudicated cases; that the time, from the *first to the fourth of March*, was, under the circumstances, immaterial as to the approval of the bond, and the validity of the office. In the 5th O. R., p. 139, the court say, the constable's bond, not having been given within ten days, it was the duty of the trustees to consider the office vacant, but if, *then*, the trustees had accepted the bond, it would have been a ratification of the appointment. This was a case where there was a total neglect to endeavor to qualify within the ten days.

Again, in the case at bar, the bond is to be accepted by the commissioners as an official act, and it is provided in the eighth section of the act establishing boards of county commissioners, that they shall hold *three* stated sessions annually, one of which is to be on the first Monday in March, and, at all of which, they shall transact any business which now is, or may hereafter be required of them. Does not this provision authorize them to accept the bond of the auditor, on the *first* Monday, although not the *first day* of March? It is, however, unnecessary to pursue the subject farther. It appears to us, that the defendant has substantially complied with the law, and that the county commissioners must be satisfied there is no intent or reasonable probability of the office being assumed before they can apply that rigid construction which has been adopted in this instance. We are led, therefore, to the conclusion, that the defendant is not guilty of intrusion or usurpation, that he is *de jure* auditor of the county of Montgomery, and judgment will be entered in his favor.

FUGITIVES FROM LABOR.

279

[Supreme Court of Ohio, February, 1845, at Cincinnati.]

Before Judge Read.

THE STATE *v.* HOPPESS, IN THE MATTER OF WATSON, CLAIMED AS A FUGITIVE FROM SERVICE.

[I am indebted for this report to S. P. CHASE, one of the counsel, who has furnished it at my request.—ED.]

A person held to service or labor under the laws of one of the states escaping from a boat, on the Ohio river, within low water-mark on the Ohio side, and fastened to the shore, on which boat his master is conveying him from one place to another, is a fugitive from labor, within the meaning of article IV, section 2, of the constitution of the United States, and of the act of congress, approved February 12, 1793.

On the first day of February, 1845, Samuel Watson, a man about thirty-five years of age, was brought before Judge Read, of the supreme court of Ohio, in obedience to a writ of *habeas corpus*, directed to Henry Hoppess, by whom it was alleged Watson was illegally imprisoned.

The return of Hoppess, respondent to the writ, set forth that Watson had been the slave of one Adams, in Virginia, under the laws of that state; that he had been removed, about four years before, to Arkansas, where he was held, under the laws, as a slave; that Adams died in Virginia in September, 1844, having previously conveyed Watson to one Floyd, a citizen resident of Virginia, in trust, for the benefit of Polly Hoppess, wife of the respondent that the respondent, with full power from Floyd, proceeded to Arkansas, and having received the custody of Watson, was returning to Virginia, upon the steamer Ohio Belle; that the steamer arrived in the river opposite to Cincinnati, before day, on the 31st of January, 1845, shortly after which Watson escaped from the respondent's custody into the state of Ohio; that the respondent did not know whether the steamer had made fast to the shore at the time of the escape, but had been informed that the steamer, when made fast, was outside of low water mark; that the respondent did not intend to permit Watson to land on the Ohio shore, but to transfer him to another boat, and continue his journey without delay; that the respondent afterwards, on the same day, arrested Watson in Cincinnati, and took him before Mark P. Taylor, a justice of the peace, for the purpose of proving his right to his services, and to obtain a certificate under the act of congress relating to fugitives from service, but he had been prevented from proving his said right, and obtaining his certificate, by the writ of *habeas corpus*.

The return was not sworn to nor supported by any evidence, but was merely subscribed "Henry Hoppess." 280

The return having been read, the counsel for the alleged fugitive proposed to examine witnesses to contradict its statements; this was objected to, but after argument,

The Judge said: "The writ of *habeas corpus*, as a security for personal freedom, is extremely defective. The statute requires the writ to be directed to the party by whom the applicant for the writ is detained, and not as I conceive it should in all cases, to the sheriff. The only mode of enforcing obedience is by attachment, which can be avoided by going out of the jurisdiction of the court. When the writ is obeyed

OHIO DECISIONS.

Court of Ohio, Cincinnati.

before the court by the respondent, the set forth. Upon the truth of the facts thus generally depends. The truth of these and evidence may be introduced to show otherwise the respondent could make his it would be without any adequate remedy. Return by evidence has been heretofore dis-

All the judges of the supreme court con- heretofore hear the witnesses. I regard my- ce, but should adopt the practice were the

en examined, who proved that the Ohio Belle he 31st of January, before day; that about wharf in the usual position of boats, her bow on shore, made fast, and with her gang- own; that she was from twenty-five to fifty measuring from her extreme outside; that out the boat, and no talk of any escape. day watch, proved that when Hoppe's ar- as standing on the landing, near the river, making no attempt to escape; that the bout sundown, and that Hoppe's requested the watch-house over night, which request

part of respondent testified that they were mark, but one of them thought a boat from shore would be outside of it.

on this return and this testimony.

Messrs. William Birney, William Johnson at he ought to be discharged from the cus- rounds:

at he was, before arriving at Cincinnati, a free as soon as the boat on which he was a ate of Ohio, and could not be restrained d, and any subsequent seizure and confine- an illegal assault and imprisonment.

the counsel insisted that the true boundary and Illinois, upon one side of the river, and was the middle of the stream: 1. Be-

g conquered the country west of the Alle- which power this territory had been ceded by prior to that of Virginia under its charter, adjudged forfeited and null, and when they nia, merely compromised a dispute, retain-

the river, and leaving to Virginia the ter- which circumstances each party must be enter of the stream 2. Because, admit- ter title, she ceded the territory northwest states, of which the Ohio was to be their cession, for such a purpose, without ex- ust be regarded as conveying to the center rginia Cession, 1 Chase's Statutes, 62; Act the Ordinance of 1787, 1 Chase, 66; Com-

pact with Virginia, 1 Ky. Stat., 50; the Virginia Patents and Charters; Pitkins' History United States; 5 Wheaton, 374.

They further insisted—conceding for argument's sake the boundary between Kentucky and Ohio to be at the low water mark of the north-western shore—that the evidence showed that the boat, on which Hoppess had voluntarily embarked with Watson, was, at the time of the alleged escape within low water mark on the Ohio side, attached to the shore, and therefore within the state of Ohio; that a slave, being a person held by force, made efficient by local law, could not be so held anywhere beyond the limits of that local law; that Watson, therefore, if legally held as a slave before coming into the state of Ohio, could not be so held afterwards, but was a man, under the protection of the constitution and laws of Ohio, and beyond the reach of the law which enslaved him; that the constitution of the United States, article IV, section 2, applied only to the case of a person held to service in one state under its laws, escaping into another, and not to the case of a person held as a slave in a state against its laws, and escaping from such illegal custody in the same state; that neither the act of Virginia, of 1789, declaring that the jurisdiction on the Ohio of the states possessing its opposite shores, should be concurrent, nor the ordinance of 1787, guaranteeing to all citizens of the United States the free use of the navigable waters leading into the Mississippi and St. Lawrence, can be legitimately construed as authorizing slaveholding for any purpose within the territory of Ohio, against the express prohibitions of slaveholding in the ordinance and in the state constitution. They cited, Ord. 1787; Const. United States, article 4, section 2; 1 Ky. Stat., 48; Somerset's case, 20 State Trials, 1; *Lunsford v. Coquilton*, 14 Martin's La. Rep., 404; *Harvey v. Decker and Hopkins*, Walker's Miss. Rep., 36; Jones' Case, Walker's Rep., 83; *Rankin v. Lydia*, 3 Marsh. Ky. Rep., 470; *Commonwealth v. Alves*, 18 Pick. (Mass.) Rep., 216; Senator Walker, *arguendo*, 15 Peters' Rep. App., 72; *Jones v. Vanzandt*, 2 McLean, 603; *Eckert v. Coirvin*, 1 West. Law Jour., 54; *Marie Louise v. Mariot*, 8 Louis. Rep., 475; Mary Soure's case on Hab. Corp., before Judge READ, Cin. Gaz., May 21, 1841; *Handly's Lessee v. Anthony*, 5 Wheat. Rep., 374; *Common v. Fitzgerald*, 7 Law Reporter, 282; *Gavil v. Chambers*, 3 Ohio, 496.

They further insisted that the facts of the case warranted the inference that Watson had come on shore with the approbation of Hoppess, and that he had requested that Watson should be lodged in the watch-house only for the purpose of preventing his escape during the night. They relied on the evidence that the escape was alleged to have taken place before day, in the morning, whereas the witnesses who saw the boat in the morning observed no bustle or any indication of an escape; and when Watson was arrested it was near sundown, and so far from manifesting any disposition to get away, he was leaning quietly against a post at the landing, not a hundred yards from the boat whence he was alleged to have escaped twelve hours before. They insisted further that as the burden was upon Hoppess to justify a seizure and detention, *prima facie* illegal, if he left the facts necessary to such justification in doubt, Watson was entitled to the benefit of the doubt, every presumption being in favor of liberty.

II. Because the act of congress "respecting persons escaping from the service of their masters," approved February 12, 1793, under which Hoppess claimed the right to hold Watson, for the purpose of taking him before a magistrate, was unconstitutional and void.

OHIO DECISIONS.

Supreme Court of Ohio, Cincinnati.

head the counsel insisted that the constitution of the United States conferred on congress no power to legislate on the subjects; that congress can claim no powers not granted to it, which powers must be such as are expressly given, or by necessary implication; that the clause relating to escaping servants, section 2, grants no power at all to congress, either by express or by implication, but is a mere clause of compact, imposing obligations to be fulfilled, if at all, through state legislation. They cited *Ex parte Hunter's Lessee*, 1 Wheaton Rep., 304; *Jack v. Commonwealth*, 525; *Commonwealth v. Aves*, 18 Pick. Rep., 216,

and further, that, if congress had power to legislate at all, the act was nevertheless void, being repugnant to several constitutional provisions; that no seizure could be more un-constitutional, or more directly prohibited by article IV of the constitution, than that in this case; for it was a naked party upon his bare claim, unsupported by evidence, a naked statement, without a warrant, and, if lawful, a very complex and important right might be in like manner seized and provided for a trial of a most important right without article VII of the amendments, which declares that "the right of liberty shall be preserved;" that the act authorized the seizure of liberty "without any process of law" at all, contrary to article VII of the amendments, which declares that no person shall be deprived of liberty without due process of law. They cited *United States v. Egan*, amendments 4, 5 and 7; 14 Wend., 525; 220; 1 Chase's Statutes, 68.

They insisted that Congress had no power to vest any part of the power of the United States in a magistrate of a state, or of the act authorizing state magistrates to hear and determine alleged escaping servants were void upon this additional position of the court in *Prigg v. Pennsylvania*, that magistrates might act, if they choose, must have been taken

that such magistrates could protect themselves against the interference of agents of the claimant, while the claimant was executing the execution of his purpose by the certificate of the court. They cited several positions of the court, in the case last mentioned, to the constitutionality of this act, which was not necessary, as they were founded on mistaken assumptions of historical facts and principles of constitutional interpretation, and were not cited as authority in this case. They cited *Martin v. Commonwealth*, 330; 1 Kent's Comm., 401; and examined at length *Prigg v. Pennsylvania*, 16 Peters' Rep., 611.

They insisted that the right to reclaim escaping servants was by the ordinance of the original states. They insisted that the articles of compact in the ordinance created a perpetual obligation, unless altered by the compact between the states and people in the northwest territory, and of such alteration had been made; that the ordinance prohibited slavery, thereby effecting the immediate emancipation of slaves in the territory, providing only that persons from the original states, escaping into the territory, might be reclaimed, provided that this proviso was then, as now, the only exception against slaveholding, and that this exception cannot

be extended to persons escaping from states admitted into the Union since the promulgation of the ordinance. They cited Ordinance of 1787, 1 Chase's Stat., 68; *Spooner v. McConnell*, 1 McLean, 341, 349; *Hogg v. Zanesville Canal Co.*, 5 Ohio Rep., 416.

IV. That upon the acquisition of the territory of Louisiana by the United States under the treaty with France in 1803, slavery ceased to be a legal relation in that territory, and that all laws authorizing slaveholding in it, or in states created out of it, are unconstitutional and void.

Under this head they insisted that at the time of the adoption of the constitution of the United States the most distinguished men and the people generally were averse to slavery, and looked for its speedy extermination; that the settled policy and understanding of the nation was that slavery should be restricted within its existing limits, and, within a convenient time, finally abolished by legislative authority; that the covenant against 'slave-trading of 1774, the declaration of 1776, the acts of several states abolishing slavery, and above all the unanimous act of congress abolishing slavery in the northwest territory, the only national territory, and prohibiting it therein forever, prove the existence of this 284 settled policy and understanding beyond all reasonable question; that the amendment of the constitution, which declares that no person shall be deprived of liberty without due process of law, was in accordance with this policy and understanding; that this amendment made it impossible for congress to legislate for the the extension or continuance of slavery, and also impossible that slavery should exist in any territory of the United States; that, independently of this amendment, congress had power under the constitution to create or sustain the relation of master and slave; that this relation, originating in and upheld alone by positive law, flowing from sovereign authority, must cease in a territory which exchanges a sovereign power, capable of creating and sustaining the relation, for one incapable of creating or sustaining it; that independently of all this, the treaty with France, which guarantees to all "the inhabitants" of the territory liberty, and the privileges of citizens of the United States, extinguished slavery in the territory; that no state was or is competent to enslave one part of its inhabitants, having been once free, to another part, such an act being a violation not only of the constitution of the United States, but of the fundamental principles on which the constitution itself stands; that slavery, therefore, was and is illegal and unconstitutional in Arkansas, and Watson, having been taken there, was emancipated, and could not afterwards be re-enslaved. They cited Const. U. States, amendment 5; 3 Madison Papers, 1429; *Grover v. Slaughter*, 15 Peters' Rep., 507; Jones' case, Walker's Miss. Rep., 84; *Jones v. Vanzandt*, 2 McLean's Rep., 602; Treaty with France, U. S. Land Laws, 43; 1 Reeves' His. Com. Law, 249.

Messrs. Nath. C. McLean and Milton N. McLean, for the claimant, Hoppess, insisted on his right to seize and detain Watson.

I. They urged that slavery is not unconstitutional in Arkansas; that no positive law ever abolished it there; that the treaty with France, correctly interpreted, did not warrant the conclusions drawn from it; that, if interpreted, as claimed for Watson, it would guaranty to females the privileges of citizens; that upon the acquisition of territory by one state from another, the personal condition of the inhabitants is not changed. They cited *Am. Ins. Co. v Canter*, 1 Peters Rep., 542; *American Constitutions*, 410.

DECISIONS.

t of Ohio, Cincinnati.

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: 2 Ohio Rep., 426; Land Laws U. S.,
Rep., 414; 2 Western Law Jour., 67; 1
apers, 139; Vattel, 210.

inion as follows:

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a hopeless and impossible task. Slav-
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ight, and is the mere creature of posi.

tive law. Hence, it being my duty to declare the law, not to make it, the question is not, what conforms to the great principles of natural right and universal freedom—but what do the positive laws and institutions which we, as members of the government under which we live, 286 are bound to recognize and obey, command and direct.

I regret deeply that slavery exists. It is the only blot upon the white pennant of universal liberty, which we have flung upon the free air, for the admiration and imitation of the world. No one can defend it, no one can support it, and it was only tolerated in our system from being combined with circumstances, which appeared to rise above our control.

I have known but one deliberate effort on the part of a minister of the gospel to reconcile slavery with Bible principles, and so far from regarding that as authority, I can only view it as evidencing a sort of moral insanity, a breaking up, as it were, of the faculties to perceive or distinguish moral truth.

Its existence should not cause bitter and uncharitable feelings towards the people of the states where it is tolerated and continued. For them we should cultivate feelings of kindness and charity. They are not the authors of slavery in this country. It existed among the colonies before our government was formed. It was the chief difficulty in the way of its formation; and in the original draft of the Declaration of Independence, was justly set forth as one of the prominent causes of complaint, that the cupidity and injustice of England made our country a mart for the barter of human flesh, and forced upon her colonies the system of slavery. But once having obtained from the peculiar characteristics of the race enslaved, its removal presents inherent and great difficulties. Had it been the slavery of white men, or men of our race such as slavery existed in Europe, it would have been an easy matter; the moment the shackle dropped or the bond was severed, they would melt away into the community as freemen, unmarked and undistinguishable. Not so with the negro. He stands out just as distinct from our race when free, as when a slave. It is not the badge of slavery but the hand of nature that has marked the difference. The question is, if free what will you do with him? No one scarcely would wish to confer upon him equal political rights, and none certainly would wish for social equality and the amalgamation of the races. So, if all were free, the presence of the negro among our people is a vast evil. If they were to be set free, shall it be at once, or shall it be upon the plan which has already been adopted successfully by many of the states, by gradual abolition. And if set free, shall they be permitted to remain among us? If set free at once, it would be unjust to the old negro, who had worn himself out in the service of his master, and who should receive from him a support, and to the young and helpless, who would have no means of subsistence. And at best it would be at once to throw upon the community the whole slave population, unaccustomed to provide for their support, without property and without the means of support. The question is surrounded with great difficulties, and can only be managed by the wisdom, prudence, and foresight of the state where it exists. Those who are anxious for the abolition of slavery should forbear to aggravate the evil, by suffering their zeal to carry 287 them to the commission of acts which annoy, excite, and awaken the passions, without at all promoting their design. These, instead of breaking, only rivet the fetters. The only power to abolish slavery is

with the states where it exists, and if let alone, there is much reason to believe that in time, state after state will find it to be her interest, politically and in all other respects, to abolish slavery, until the evil will eventually disappear. But this is for the states themselves to do.

Upon a subject of so much excitement, all should cultivate a spirit of mildness, candor and neighborly feeling. We should remember that good in life seldom comes unmingled with evil. Those who fix their eye alone upon an evil, and rush forward to remove it, may destroy the good also. We should remember that wisdom above that of man, which directed that the tares be not removed lest the wheat be destroyed also. We should be guided by this wisdom in reference to our government, which tolerated slavery, which was found existing at its formation, to respect and observe in the highest good faith that compromise of a great difficulty, which the wisdom and patriotism of the fathers of the country adjusted and settled, lest we may put to hazard the rich good we enjoy.

It is to be furthermore observed that ours is a government of white men. That our liberties were achieved, and our government formed by white men and for white men. The negro was not included or represented—the hope then was as it now is—that the whole race of negroes should at some future time be removed to a country of their own, to be subject to their own government and laws.

With these views as to the policy, general principles, and intentions of those who gave organization and life to our government, in reference to negro slavery and the negro, as fixing the great outline to govern the doctrines of construction and presumption, sometimes resorted to in the ascertainment of the true meaning of written laws, and the application of general principles, we approach the legal questions directly under consideration.

Questions of higher moment could not be presented to the consideration of a court.

It is claimed that by the treaty with France of 1803, for the cession of Louisiana to the United States, slavery cannot exist within the limits of that territory. That the ordinance of 1787, for the government of the Northwestern Territory, is above the constitution of the state of Ohio, and the constitution of the United States, and confines the recaption of fugitives from labor to the original thirteen states alone, and that by its operation no slave escaping to Ohio, from any of the new states can be reclaimed. That the law of congress providing for the recaption of fugitives from service is unconstitutional. And that the right of enforcing the duty of surrendering up fugitives from service belongs exclusively to the states. That the jurisdiction of the state of Ohio extends to the middle of the Ohio river, or to *ad filum aquæ*, and that the moment a
288 master comes, with his slaves, within that line, on the Ohio side, whether by design, force, fraud, mistake, stress of weather, or inevitable accident, or by any means whatever, the slave is free, and cannot be reclaimed. And especially if a boat on which a master with his slave, was navigating the river, should touch the shore on the Ohio side, from whatever cause, either with or without the consent of the master, that the relation of master and slave would cease, and that the slave could not be recaptured.

The treaty with France was for the cession of territory and the change of allegiance. Its object was not to change the relations of persons or the rights of property. Although the "*inhabitants*" of the ceded territory were, by the treaty, secured in all the rights and privileges guar-

anted by the constitution of the United States, neither slaves nor Indians were regarded as *inhabitants*, in the sense of that word, as employed in the treaty—and it has never been regarded that the force of that term made freemen of the one, or citizens of the other. The construction given the treaty by the acts and uniform understanding of the parties making it, is opposed to any such interpretation. France has never complained that the continuance of slavery in the territory thus acquired was a violation of the treaty. The United States have never acted upon the construction that slavery was abolished by the treaty. But new states have been carved out of the territory, and admitted into the Union, with constitutions recognizing slavery. No court has ever construed the treaty as abolishing slavery. To give a construction different from that acted upon and universally understood and recognized, and to declare that slavery could not exist by the force of such treaty within the territory acquired of France, would be in violation of all just rules of legal interpretation, and totally unwarranted. If the effect of the treaty had been as claimed, the taking Watson to Arkansas would have set him free.

It is claimed by the ordinance of 1787, for the government of the Northwestern Territory, that the right of recaption of fugitives from service escaping into such territory, is confined to fugitives from some one of the original thirteen states. That the ordinance being of the nature of a compact, is of superior binding force to the constitution of the state of Ohio, or the constitution of the United States. That the right of recaption of fugitives from service from any of the new states is prohibited, or at least not granted, and that such right, therefore, does not exist to the new states, whatever may be the provisions of the constitution and laws of the United States.

The Union is composed of states of equal rights and powers. The new states admitted into the Union are subject to the performance of the same duties, and possess the same sovereign, inherent, and guaranteed rights of any of the original states. Hence, the right of recaption of fugitives from labor is secured to the new states under the constitution of the United States, to the same extent that it belongs to the original states. The ordinance was an act of Congress for the government of a territory—and however much I may respect the principles of the ordinance, yet the moment the people of Ohio formed themselves into a state, by the adoption of a constitution, and an admission into the Union, they became clothed with all the rights and powers of an original state, and the constitution of the state became the supreme law of the state, in place of the ordinance governing it as a territory. And it would be strange, indeed, to hold that an ordinance passed by a congress, could be superior to the constitution of the United States, adopted by the people and the states as the supreme law of the land—not subject to alteration by Congress, but only by the power which formed and adopted it. A slave, therefore, owing service, and escaping to Ohio from a new state, is subject to recaption precisely as though the escape had been from one of the original states. 289

It is claimed that the provision of the constitution that a person owing service or labor in one state, escaping into another, shall not be discharged from such service or labor, confers no power upon congress

to legislate upon the subject, but only imposes a duty upon the states, to be executed by their own laws.

When the constitution of the United States imposes a duty or secures a right, congress is empowered to enact such laws as are necessary to enforce the one and secure the other. The subject of slavery is one of irritation and difficulty—and if it were left to the states to secure the rights of the master to his fugitive slave, the provision of the constitution of the United States, that the escape should not discharge the right to the service, would be of little worth. The provisions of the different states to secure the right of the master to whom the service was due, would probably be different—some might impose so many restrictions and difficulties as quite to destroy the right—whilst others, taking entire ground against slavery, might refuse to act at all. In this way, the compromise might be totally evaded, or its entire spirit violated. And if congress should attempt to enforce it, it would be by acting upon states. This view would bring us to the weakness of the old confederation, and defeat the chief object of our present constitution. Under the confederacy, the general government could only act upon the states—and an act of disobedience could only be enforced by an act of war. This was the defect of all the confederacies of ancient and modern times—the attempt of a confederacy to enforce a state, usually terminating in a conflict that destroyed the confederacy.

Our constitution remedies this defect by bringing the powers of the general government to act upon individuals directly, instead of states. Hence, the powers of congress should be construed to remedy the evil, and advance the intention of the framers of the constitution. If this were wholly a new question, I should decide that congress had not only the power—but that it is a duty imposed upon congress to legislate upon this subject. But this is not an open question. The supreme court of the United States, whose peculiar duty and power it is to settle questions of this character, have decided that congress had the power, and that the law passed upon this subject is constitutional. It could hardly be supposed that I would refuse to respect the decision of that tribunal, especially empowered to decide such questions. But it is said that congress has no power to confer authority upon a magistrate of the state to perform the duties prescribed under the act of congress. It has been decided also by the supreme court of the United States, that a magistrate of the states at least, may act if he choose—which, for the purposes of this investigation, may be regarded as settling that matter.

The remaining great question, and the one which I regard of chief importance in this case, is respecting the jurisdiction over the Ohio river, and the effect of coming within the Ohio side of the middle of the stream, or touching upon our shore in the navigation of the river, upon the right of the master to his slave.

If a master bring his slave into the state of Ohio he loses all power over him. The relation of master and slave is strictly territorial. If the master takes his slave beyond the influence of the law which creates the relation, it fails—there is nothing to support it, and they stand as man and man. The slave is free by the laws of the state to which he has been brought by the master, and there is no law authorizing the master to force him back to the state which recognizes and enforces the relation of master and slave. At one time I was of the opinion he had the right of passage through a free state with his slave. This probably would harmonize with the spirit of the compromise upon this subject.

But upon more careful examination, I am satisfied the master must lose his slave, if he brings him into a free state, unless the slave voluntarily returns to a state of slavery; because the master loses all power over the slave by the law of the state to which he has brought his slave; and there is no other law authorizing him to remove him. The constitution of the United States only recognizes the right of recapture of a fugitive held to service in one state *escaping into another*. The person owing service must escape from the state where such service is owed into another state. The act of congress carrying into effect the constitutional provision, authorizes a recaption only when there has been an escape from the state where the service was owed into another state. If there has been no such escape, the master has no right of recaption, and the slave may go where he pleases—the master has lost all control over him. If the master bring his slave into Ohio, and the slave refuse to go any further or to return into a state of slavery, there is no escape from the state where he owed service. In such a case how could the master prove that the slave had fled from the state where he owed service, which the act of congress requires to authorize his being taken back? The truth is, in such case the slave had not fled or escaped, but had been brought by the master into the state where the relation of master and slave ceased. The facts authorizing his seizure and transportation, required by the act of congress, not existing, and the laws of the state to which he is brought not recognizing slavery or the right of the master in any respect, the slave must necessarily go free, if he choose, from the fact that the master has, by his own act, lost all power or control over him. Hence, if Mr. Hoppess brought his slave into the state of Ohio, or permitted him to come here, he has no authority to detain him in custody, or to remove him from the state. The facts in this case were, that Mr. Hoppess was transporting the person in custody from the state of Arkansas to Virginia, on board the steamboat Ohio Belle. She landed at the 291 wharf of the city of Cincinnati, contrary to the wish of Mr. Hoppess who desired to be landed on the Kentucky shore, and from the boat thus lying on the water of the Ohio, Watson, the person claimed as a fugitive slave, escaped into the state of Ohio, and has been arrested by Hoppess to take him before a justice of the peace to make out his claim and procure a warrant for his removal. Now, if the steamboat was within the sole jurisdiction of the state of Ohio, there is no right to remove, and Watson is illegally detained. This brings us to the important question of the jurisdiction over the Ohio river. The boat, at the time of the escape, was lying above low water mark on the Ohio side.

It is claimed that the Ohio river is the boundary of Ohio, and that her jurisdiction consequently extends to the middle of the river—that Virginia and Kentucky have no right to claim to low water mark on the northwest side of the river—that the deed of cession of the Northwestern territory, by Virginia, could not be referred to as fixing the boundary line, as she had no right to the territory—that her original charter, conferring upon her a right to the lands, had been annulled by the Crown—and that the French had seized the territory, and that it had only been regained by the blood and common treasure of all the colonies. It is quite too late to question the validity of the deed of cession—the magnanimity and patriotism of the Old Dominion, the mother of states, was acknowledged, and the grant accepted, which estops all denial of the deed. The courts of Ohio have recognized it, in sustaining the titles of all the lands held by grant from Virginia in the military district.

By this deed the lands to the northwest of the Ohio river were ceded. What could have been the object of this phraseology? Not certainly to retain the land in the bed of the river, and the island in the stream. These would be of but trifling value compared with the great gifts already made. It unquestionably was to secure the full and free use of navigating the river, without hazarding any interference with her slaves navigating the river, by extending her jurisdiction over the water in the bed of the stream. She foresaw that difficulties would arise, in respect to the jurisdiction over the river, by the states bordering upon either side, and to put all dispute at rest, in her compact for setting off Kentucky as a state, she declares that the jurisdiction over the river should be common or concurrent to the states bordering upon it. Thus, for the service of civil and criminal process, it has been repeatedly decided in our courts, that the jurisdiction of Ohio and Kentucky was concurrent over the water within the banks of the river, without reference to high or low water mark. True, it has been decided if a boat was attached to either shore, for the purpose of civil or criminal process, the jurisdiction was exclusive in the state to which it was attached. Whatever may be the boundary line for determining the rights to property, it is clear that the state of Ohio, for other purposes, has only a concurrent jurisdiction over the water within the banks of the river. But for the purposes of navigation, what is the jurisdiction upon the river? The Ohio river is declared to be the common highway of the citizens of the United States. It is as free to the people of Kentucky and Virginia, as the people of
292 Ohio. But it is contended the people of Ohio have the right to go down to the river, and say to the people of Virginia and Kentucky, and all others, you shall not navigate the Ohio river this side of the middle of the stream with your slaves. If you come this side of the middle of the stream, by accident, mistake, or are driven by the force of winds, or ice, or by distress, our laws authorize us to take from you your slaves. If you land upon our shore, or are driven there by any cause, your slaves are free. This is strange language to the people of a sister state. The effect of the whole matter is to deny the right to navigate the Ohio with a slave. For it is impossible oftentimes to avoid crossing the middle line of the river—sometimes to avoid collisions with other boats, drift-wood, ice—to avoid sand-bars and ripples in low stages of water—and from many other causes which may arise. If this view could be sustained in law, it would be lamentable indeed. It would make the Ohio river in truth what it has been said that its name signifies, the river of strife—the war-river—the river of blood. The people on the one side would attempt to free the slaves on the river—the people on the other would regard it as mere robbery, and would defend their property. But such is not the law—these difficulties were foreseen and guarded against by the foresight and wisdom of Virginia, and she has, by the means above named, having dominion over the whole river, and the lands on both sides, secured to all, as far as their interest was concerned, a common jurisdiction. This jurisdiction is over the water itself in the bed of the stream—and not confined to fixed lines. Thus, a master navigating the river, whilst upon the water, is within the jurisdiction of Virginia or Kentucky, for the purpose of retaining the right to his slave. And if the slave escape from the boat, it is an escape from the jurisdiction of one state into another, within the meaning of the constitution and the act of congress.

This view is not opposed by the fact that the boat may, for the purposes of the ordinary navigation by the river, be made fast to the Ohio shore. The right to use the shore for the purpose of navigation is incident to the right to navigate, and does not change the relation of master and slave.

The escape in this case was from a boat attached to the Ohio shore, and afloat upon the body of the water—hence, the slave is subject to recaption.

The facts of this case are set out in the return to the writ of habeas corpus, established by evidence contradicting in some respects the return.

The question is whether these facts would warrant the detention in law. Having decided the legal points raised upon these facts as above, the facts and law warrant Watson's detention. I have already declared that I would not examine the facts of the case as to whether slave or no slave, for the purpose of a warrant for a removal of Watson, as I have no authority to grant such a warrant. The fact is set out in the return, and not contradicted, but taken as true, that Watson was a slave, and is a fugitive from service, unless discharged by the peculiar circumstances of the case. 293

This being a writ of habeas corpus, to discharge Watson from illegal custody, and Hoppess' custody being found legal, Watson is left in such custody, to be taken before a magistrate for a warrant of removal, under the act of congress, if the facts be made out warranting it.

This question has been argued for a number of days, and has received the most full and ample examination, and it is to be hoped that it may now be regarded as settled. As good citizens it is the duty of all to endeavor to preserve harmony, by observing strictly the rights of others, and by adhering faithfully to the spirit and principles of that great compromise of a most difficult and vexed question. We shall never be able to adjust it more favorably, and by disturbing it there is reason to believe, that it will excite passion and hostile feelings, which may perpetuate an evil, which, it is the hope of all, may, in time, by the action of the states where it exists, be wholly removed.

[I have received from N. C. McLean and M. N. McLean, the counsel for Hoppess, the following communication in reference to the report of this case, published in the preceding number of this Journal, page 279.—ED.] 333

To the Editor of the Western Law Journal:

The report of the above case, as made out by S. P. Chase, Esq., and published in the last number of this Journal, not having fully stated the points made by the counsel for the claimant, the undersigned, without attributing to Mr. Chase any improper motive for the variance between the points made and relied on in the argument, and those published, ask, in justice to themselves, to publish in your widely circulated Journal, the following *heads* of their argument, not wishing to elaborate the points made, or giving any thing of the argument by which they were enforced and explained.

N. C. McLEAN,
M. N. McLEAN.

The points we made were the following:

1. That when the slave Watson left the Ohio Belle (steamboat) she was not within the sole jurisdiction of Ohio; that the deed of cession from Virginia of the 1st of March, 1784, conveyed to the government of the United States the soil northwest of the Ohio river, and never had been deemed to have carried title further than the water's edge, or low water mark. Cited 1 Chase, 62; 11 Ohio Rep., 138.

2. That the Ordinance of 1787 gave no title to soil or jurisdiction beyond that of the deed of cession; that its only essential parts were those declaratory of the future government of the territory, and fundamental as to the rights of the inhabitants therein. 1 Chase, 70-4.

3. That the title of Virginia and her right could not now be disputed; that the Government had recognized her title by receiving a conveyance from her; that her title was good, and had been acquiesced in by the rest of the states.

4. That the act of the legislature of Virginia of 18th January, 1789, conveyed to Kentucky all her rights to that part of her own territory west of Big Sandy river, saving only to the states on the opposite shores of the Ohio river *concurrent* jurisdiction over the stream; that this left the title to the *soil* of the river in the Kentucky proprietor; that Kentucky claims now, exclusive jurisdiction over this river. Cited 1 vol. Ky. Laws, 46, § 5; 48, § 11, p. 50, 258; 5 Wheaton, 379, 385; Hist. Soc. of Ohio, 86.

334 5. That there was a broad and palpable distinction between the soil covered by streams *within* the northwest territory and the rights which accrued to the proprietor upon the boundary stream of the state. Cited 6 Ohio, 508; 2 Ohio, 425, 26; 3 Ohio, 496; Land Laws, U. S., 424, § 9.

6. That if the court should decide that the ownership of the soil upon the Ohio side, carried with it title *to the middle* of the stream, that even then the right to *navigate* the Ohio river being free to all the inhabitants of the United States, and the jurisdiction over the same being *concurrent*, that it gave the right to all so navigating the river, to touch and land, whenever and wherever necessary and proper, without being subject to the peculiar laws of a state on whose shores a landing was made, if those laws should differ from the laws of the state to which the citizen did belong, in reference to what should constitute property. Cited 1 Kent, 34, 36; Vattel, 193, 200; 10 State Papers, 139; Const. U. S., art. 4, § 2; Ordinance, 1787; 1 Stat. Ky., 48.

7. That the law of Congress under which the arrest was made and the proceedings had, was constitutional. Story Const. [abrd.] 644, 649; Prigg's case 16 Peters, 611; 2 M'Lean, *Jones v. Vansant*, 602; Wheeler's Law of Slavery, 371-2; 2 Pick., 11, *Com. v. Griffith*.

To show that the state by her laws might aid, and that Ohio by her legislature had recognized the law, were cited Prigg's case, pages 91, 105, 111, 126, 127; Swan's Statutes, 600; 41 General Laws of Ohio, p. 13.

In opposition to the doctrine that the states *alone* could legislate on the subject, were cited U. S. Const., art. 1, § 9; last clause, 8 sec., 1 art; 2 sec., 4 art; the opinions of Justices Taney, Wayne and Story in Prigg's case; 16 Peters, etc.

8. That slavery exists in Arkansas, and is recognized by her laws; that the treaty with France, 3 art., could not change the relation that before existed between the inhabitants within that territory; that slavery existed at the time of the cession, and was not abolished by the cession; that Congress never by any law abolished slavery, during the time the territory was under her jurisdiction; that since, the *people* of Arkansas had adopted a constitution in which slavery was recognized, were cited treaty with France, 3 art.; 1 Peters, 542, 544, *Am. Ins. Co. v. Canter*; Const. of Ark.

Counsel, in reference to the construction of the treaty with France as contended for, insisted that if the word "*inhabitants*," used in that treaty, must be so construed as to free all the slaves in the ceded territory, and confer upon them all the privileges of citizens of the United States, that it might also be so construed, and upon the same reasoning, as to confer upon all the females in that territory all the privileges of the white male citizen of the United States, including the *elective franchise*.

Counsel did not contend, as is alleged, that "slavery existed of natural right, and the opposite doctrine was the offspring of enthusiasm;" but they did insist that slavery did not owe its origin in this country to a positive law in favor of its existence, and that it now existed in *all* of the states where its existence had not been prohibited by a *positive law*.

And they indignantly refuted the doctrine insisted upon by the counsel for Watson, that his once having touched the shore of Ohio, no matter by what means he got here, whether by fraud or force, he was thereby instantly free. We insisted, that if they had stolen him from his master, that he would not thereby become free, etc.

MORTGAGE FOR CONTINGENT LIABILITY.**325**

[Court of Common Pleas, Hamilton County, Ohio, February Term, 1845.]

JOHN BURGOYNE, ADMR. OF THE ESTATE OF JAMES C. LUDLOW, DECEASED, AND THE LAFAYETTE BANK OF CINCINNATI, v. CHARLES S. CLARKSON, SAMUEL GRANT, DEXTER STONE, ET AL.

[Reported by J. W. TAYLOR.]

When a mortgage is given to indemnify the mortgagee against a contingent liability the fact of such liability and the amount of injury sustained, must first be ascertained, before the lien can be enforced against the mortgagor or subsequent purchasers. The assignee of such a mortgage succeeds to no other rights than those of his assignor.

An agent acting without compensation, is only liable for gross negligence.

Notice to the president of a bank of an outstanding mortgage, is notice to the bank.

In Ohio, the first recorded mortgage is the first lien, although the mortgagee may have had notice of a prior unrecorded mortgage. Nor does this rule apply only to an instrument executed in due form of law, but includes equitable mortgages.

This cause came on for hearing at the February term of the Hamilton common pleas, upon a bill of foreclosure, filed by Burgoyne, admr. of the estate of James C. Ludlow, deceased; the answer of Grant and Stone, and also a supplemental and amended answer, in the nature of a cross-bill filed by them, the answer of the Lafayette bank to said cross-bill, the separate answers of Josiah Lawrence and other defendants and testimony.

The following appear to be the material facts of the case:

Previous to January, 1840, Charles S. Clarkson had been extensively engaged in the pork business at Cincinnati, and his paper had been discounted in the Lafayette bank, upon most of which James C. Ludlow was an accommodation indorser. To secure the payment of a note for his debt, indorsed by Ludlow, Clarkson, on the 11th of January, 1840, executed a mortgage to Ludlow, which was duly recorded, upon two tracts of land in the northern part of Cincinnati, called in these proceedings the "Western Row property." After this mortgage was given, the note held by the bank fell due, and at July term, 1840, a judgment was obtained against Clarkson as principal and Ludlow as surety, for \$59,767 damages besides costs. Clarkson was then and has since been insolvent, and the execution was levied, and still continues a lien upon the estate of Ludlow. To secure the payment of this note by Clarkson, the bank had taken a mortgage from him upon 530 acres of land in Hamilton county, lying just north of Cincinnati, and known as the "Clifton farm." This mortgage, which was dated April 16, 1839, was foreclosed by the bank, and a decree of sale was obtained at June term, 1841, of Hamilton common pleas, and enough was realized from its proceeds to reduce the liability of Ludlow to about \$25,000. To relieve his estate from this incumbrance, Burgoyne, his administrator, on the 1st of July, 1842, filed his bill for the foreclosure of the aforesaid mortgage upon the Western Row property. The Lafayette bank concurred as complainants; and the defendants, many of whom represented various unimportant relations to the property in question, were quite numerous.

326

Another mortgage was set up by Grant and Stone, which was claimed to be a prior lien upon the Western Row property, executed by Clarkson to Josiah Lawrence, and assigned by him to Grant and Stone. The history of this instrument was as follows :

In September, 1838, Clarkson was introduced to Grant and Stone, commission merchants of Philadelphia, by letter from Lawrence, highly recommending him to their personal and business acquaintance. Between the 12th and 20th of September, an arrangement was made between Clarkson and Grant & Stone, in Philadelphia, by which Clarkson agreed to consign to Grant & Stone at least 500,000 pounds of bacon, making them his exclusive agents for its sale in the eastern markets, and they were to accept and pay his drafts for \$30,000. As this was asserted by Grant & Stone to be a departure from their usual course of business, inasmuch as their practice was to make no advances upon produce until they should receive the bills of lading, or some other satisfactory evidence of its transmission, a liberal per centage was to be paid by Clarkson, and the performance of Clarkson's contract was to be secured to the satisfaction of Lawrence, who was a resident of Cincinnati, and well known to both parties. These preliminaries were proposed in letters of Grant & Stone to Clarkson, dated September 13, 14 and 19, 1838, acceded to by the latter, and communicated by him to Lawrence on his return to Cincinnati, who wrote to Grant & Stone, under date of September 28, 1838, that Clarkson would that day give ample security for any liabilities they might come under for him, and referring specially to a draft for \$10,000. Grant & Stone continued to pay sight drafts of Clarkson to about \$30,000. During the month of October, 1838, Clarkson applied to Grant & Stone, asking further acceptances to the amount of 327 \$20,000; and Lawrence assured them by letter, dated October 15, that the security held by him was ample to cover them. This security was an informal mortgage of the "Clifton farm," unattested, and without date or seal, but in fact executed between September 28 and October 15th, 1838. It remained in the possession of Lawrence, as the mutual friend of both parties, acting for both without compensation from either. The advances of Grant & Stone, of which Lawrence was advised, amounted in the whole to about \$50,000.

In April, 1839, Grant & Stone received from Clarkson 814 hogsheads, containing about 610,000 lbs. of bacon, some of which was sold at such rates, that the sale of the whole would have produced about \$66,000; but the principal part was stored at Clarkson's request, and retained in the hope of advanced prices. Lawrence, meanwhile, on being advised by Clarkson what amount of bacon had been shipped, and after a comparison of current rates with the quantity in the hands of Grant & Stone, deemed the amount fully sufficient to secure them, and regarding the contract to ship sufficient provisions to Grant & Stone to cover their advances, as having been fully complied with by Clarkson, surrendered the informal instrument of October 15, 1838, which he considered himself as holding to secure the performance of that contract. This surrender was not known to Grant & Stone until August following.

On the 16th of April, 1839, and after this surrender, Clarkson mortgaged the Clifton farm to the Lafayette bank, to secure the payment of his note for \$59,000 as before mentioned. Josiah Lawrence was at that time president of the bank.

Bacon fell in price most ruinously, and on the 16th of July, 1840, the balance against Clarkson, in account with Grant & Stone, was \$25,700.60,

afterwards adjusted October 17, 1840, by Clarkson's note for \$25,000, payable in three years with interest.

About the 30th of August, 1839, Grant & Stone were apprised that the security of October 15, 1838, had been given up, and on their expressing themselves dissatisfied, Lawrence took a mortgage upon other property of Clarkson, which, though than deemed adequate, proved, in consequence of the great decline in the price of real estate, and the unexpectedly large amount of the balance against Clarkson, to be quite insufficient.

On the 30th of November, 1839, Clarkson executed to Lawrence the mortgage before referred to upon the Western Row property (the subject of the aforesaid mortgage of January 11, 1840, to James C. Ludlow), conditioned "to indemnify and save harmless said Lawrence from all liability whatever to Grant & Stone for failing to take sufficient security, or releasing any security whatever when taken, in behalf of Grant & Stone, to indemnify them against loss or detriment from their acceptances of said Clarkson's drafts to the amount of \$50,000." As already mentioned, this mortgage was assigned by Lawrence to Grant & Stone on the 17th of October, 1840, when the liability of Clarkson to Grant & Stone, was liquidated as aforesaid.

In 1840 some services were performed by Grant & Stone for Lawrence, for which they declined to make any charge, on account of Mr. Lawrence's unrequited service to them in the Clarkson business. 328

Grant & Stone never set up any claim against Lawrence as having made himself liable to them by neglecting to take sufficient security from Clarkson, or by surrendering security taken, by suit, or by word, or letter, until after the filing of the bill of the complainant.

The original answer of Grant & Stone, filed May 22, 1843, insisted that Lawrence was liable to them for the whole amount of Clarkson's deficit, and they consequently relied upon the assignment of the aforesaid mortgage of indemnity. The supplemental and amended answer, in the nature of a cross-bill, filed March 16, 1844, set up the informal instrument of October 15, 1838, which was alleged to be a lien upon the Clifton farm, prior to Clarkson's mortgage of April 16, 1839, to the Lafayette bank. The answer of the bank denied both positions.

S. P. Chase, for complainant, made the following points:

1. That the facts in the case showed that Grant & Stone and Clarkson agreed, that the security should be collateral and temporary only, designed to secure the faithful transmission of the bacon; that Lawrence being advised of this by Clarkson, and not advised to the contrary by Grant & Stone, was not guilty of any negligence in surrendering the instrument of October 15, 1838, when satisfied that its design was effected, but was bound to give it up on Clarkson's demand; that being only a mandatary, nothing but gross negligence could make him liable, and no negligence at all having been shown, but *at most* a mere mistake, the mortgage given to indemnify him against liability for negligence, was a sheer nullity, utterly unavailing to Grant & Stone under the assignment to them. Story on Bailments, 130.

2. That Grant & Stone should have first ascertained the liability of Lawrence by suit, and thus fixed by a recovery at law the nature and extent of the defeasance in the mortgage of indemnity. 1 Story Eq. Jur., 89; 2 Story Eq. Jur., 696.

3. That Grant & Stone never set up any claim against Lawrence, never made or sought to make him liable to them; that, consequently, Lawrence was never damnified, and could not himself claim under the mortgage; and that Grant & Stone, claiming through him, could not enforce a mortgage to him which he could not himself enforce.

4. That the correspondence of Grant & Stone, subsequent to their knowledge of the surrender of the instrument of October 15, 1838, amounted to a ratification of his acts; and that the settlement of October 17, 1840, and their availing themselves of the security taken by him, also amounted to such a ratification. Story on Agency, 296, 160.

5. That the indemnity mortgage did not contemplate any liability of Lawrence for not taking adequate security in the fall of 1839; and if it did, it was clear that he was not liable, for he took all the security Clarkson would give him, and security too which nothing but unforeseen circumstances prevented from being adequate.

329 6. In answer to the allegation that the informal mortgage on the Clifton farm was still a subsisting lien, it was submitted that it had been inconsiderately surrendered by the agent of Grant & Stone; that, if the bank had any notice at all, it was a notice of such a surrender; that, if the bank was to be charged with constructive notice of facts to its president, Grant & Stone must be taken to have assented to the mortgage to the bank, because their agent knew of such mortgage being given, and withheld notice of their equity. As to the notice necessary to break through registry acts, he cited *Dey v. Dunham*, 2 Johns Ch. Rep., 190; 8 Cowen 260; 1 Shoale & Letroy, 103.

7. Assuming that the Lafayette bank had full notice of the equitable mortgage of October 15, 1838, yet, as their mortgage of April 16, 1839, was first recorded, it was claimed to have a paramount lien. *Stansel v. Roberts*, 13 O. R. 155.

For Grant & Stone, *Wright, Coffin & Miner* made the following points:

1. That the equitable mortgage of October 15, 1838, was still a subsisting lien; that the letters of Grant & Stone, under which Lawrence assumed his agency, explicitly insisted upon the guaranty of Lawrence, or certain security on real estate; that Grant & Stone made all their advances upon the strength of the equitable mortgage; they did not suspect nor authorize its surrender, and have never ratified that act so as to preclude them from setting it up in this proceeding. They cited Story on Agency, 296, to the point, that full knowledge of all the circumstances is necessary to the ratification of the unauthorized act of an agent. These Lawrence did not communicate to Grant & Stone, and they may elect to hold on to the security as against the parties thereto, and subsequent purchasers with notice.

2. That the instrument of October 15, 1838, though informal, is yet an equitable mortgage, good against Clarkson, and all who may have notice of its existence. 4 Little Rep., 168; 3 Powell on Mort. 1049, 1052, 1058; 7 O. R., 169.

3. That notice to Lawrence of the equitable mortgage, and the circumstances attending it, was notice to the bank of which he was president. 2 Hill's Rep., 461; 3 Hill's Rep., 274; 1 South West. Law Jour. 19; 4 Paige's Rep., 136; 7 Wend. Rep., 31.

4. That if a second mortgagee has notice of a prior amended mortgage, he will not be allowed to defeat its lien by primarily registering

such subsequent mortgage: Or, if this well established principle is shaken by the case of *Stansel v. Roberts*, still that case must be confined to mortgages executed according to the statute, and does not refer to an equitable mortgage, which stands on ground quite distinct, and must be regarded as a trust, whose construction depends upon general chancery principles, and to which the doctrine of notice therefore applies.

5. That at all events, Lawrence is liable to Grant & Stone for the loss sustained by them on their advances. He did not exercise reasonable care and diligence. When he took security in October, 1838, he neglected to observe the legal forms requisite to place it on record. 330 He was only employed to *take* security, *not* to *surrender* it. When the subsequent mortgage on the pork house and Graham country seat was given by Clarkson, he neglected to ascertain the nature and extent of prior incumbrances, and should have had the mortgage, taken for his own indemnity, executed immediately to Grant & Stone. He failed to communicate the surrender of the equitable mortgage until several months afterwards. He is therefore liable to Grant & Stone for the whole amount of Clarkson's deficit to them, which might have been secured, if it had not been for his acts. The mortgage to indemnify him against such liability, now held by Grant & Stone by assignment, being prior in date and record to the Ludlow mortgage, is a paramount lien upon the Western Row property. They cited Story on Agency, 216-7, 220, 234, 296; 1 Esp. Rep., 75; 9 Pick. Rep., 369; 1 Wash., C. C. Rep., 152.

The court held the case several days under advisement, and then CALDWELL, P. J., delivered an opinion, of which the following is an abstract:

The testimony and exhibits in this case are voluminous, but it is unnecessary to do more than advert to the prominent facts disclosed. Clarkson was a merchant in extensive business in Cincinnati; Grant & Stone were merchants in extensive business in Philadelphia; Lawrence, a merchant in Cincinnati, was their mutual friend. In the fall of 1838, Lawrence introduced Clarkson to Grant & Stone by letter, stating that he visited the eastern cities with a view to obtain money for carrying on the pork business, proposing to give security on real estate. Clarkson had similar letters from other merchants of Cincinnati to other eastern firms. He called on Grant & Stone, and made an arrangement with them for an advance by them to him of \$30,000, and for the shipment by him to them of not less than 500,000 pounds of bacon. He was to give the guaranty of Josiah Lawrence for the performance of his part of the contract, or security to the satisfaction of Lawrence. On his return to Cincinnati, Clarkson advised Lawrence of the arrangement, and exhibited to him the letters of Grant & Stone to himself, stating their understanding of it. Grant & Stone did not themselves write to Lawrence, or give him any instructions. After the interview with Clarkson, Lawrence took from him an equitable mortgage to Grant & Stone on the Clifton farm. The object of this mortgage was to secure the shipment of at least 500,000 pounds of bacon, to cover the advances of \$30,000, and also to indemnify Grant & Stone against loss in consequence of further advances. Lawrence advised Grant & Stone that he held security, and that it was ample; and on the strength of it, Grant & Stone accepted for Clarkson to the amount of \$21,000 in addition to the \$30,000. They advised Lawrence of their having raised the \$30,000, and of having given Clarkson authority to draw for \$20,000 more; which advances

they should consider under his guardianship, and spoke of it as depending on the single risk of Clarkson's life. Clarkson shipped to Grant & Stone upwards of 600,000 pounds of bacon, and then in 331 April, 1839, demanded a surrender of the equitable mortgage, with a view to mortgage the same property to the Lafayette bank, in order to relieve his indorser, Carneal. Lawrence having satisfied himself as to the amount of bacon shipped, surrendered the mortgage. He was the president of the bank. Clarkson mortgaged the property to the bank to secure a note for \$59,000, on which Ludlow was indorser. Grant & Stone sold a part of the bacon for good prices, but held on to the larger portion at the earnest instance of Clarkson, who was extremely sanguine of advance in price. Prices, however, declined constantly; and in July, 1839, Lawrence, corresponding with Grant & Stone on other subjects, inquired of them if they considered themselves as fully covered for their advances to Clarkson. They replied in the negative, and expressed their reliance on his having security for them. He replied that Clarkson *would* give security. They expressed their surprise at the language, supposing that he already held ample security. He answered that he had given up the security originally taken, having satisfied himself that sufficient bacon had been shipped to cover them, but that he had now taken other security, which he regarded as sufficient. They expressed themselves satisfied as to his good intentions, but regretted he had given up the original security.

The security last taken by Lawrence was upon Clarkson's pork house, then valued at \$35,000, and on Clarkson's residence, valued at about \$15,000. There were incumbrances on the pork house, one of about \$6,000, and another of uncertain amount. This last mortgage was at the time thought of little importance, but was afterwards ascertained to be over \$17,000. The pork house has since been sold, and the second mortgage upon it has not been satisfied.

Some time after taking this mortgage, Lawrence became apprehensive that the security would not prove sufficient, and again applied to Clarkson. He refused to give any further security to Grant & Stone, alleging that he had given them enough, but was willing to secure Lawrence against any possible liability to them on his account. Accordingly a mortgage to Lawrence on the Western Row property was drawn up, dated November 30, 1839, conditioned to indemnify him against any liability to Grant & Stone for neglecting to take security, or for surrendering security taken. This mortgage was recorded.

After the execution and recording of this mortgage, Clarkson mortgaged the same property to Ludlow, to indemnify him against his liability as Clarkson's indorser in the Lafayette bank on the note secured by mortgage on the Clifton farm, as already stated. This mortgage to Ludlow, which was dated January 11, 1840, was duly recorded.

Afterwards, in October, 1840, the amount due from Clarkson to Grant & Stone, in the winding up of the bacon speculation, was ascertained to be \$25,000, for which sum Grant & Stone took Clarkson's note, payable in three years with interest. Lawrence assigned to Grant & Stone the 332 mortgage held by him, and Clarkson by a memorandum indorsed on it, agreed that it should be held security for the balance ascertained to be due.

Subsequently judgment was obtained by the bank on the note against Clarkson as principal and Ludlow as surety; the mortgage on the Clifton

farm was foreclosed, and the property embraced in it sold, leaving a balance on the judgment of about \$25,000.

The complainants have filed their bill to subject the property mortgaged to Ludlow to the payment of the balance for which he is liable to the Lafayette bank on his indorsement. They are entitled to a decree unless the respondents, Grant & Stone, can show a better right.

The respondents claim under the mortgage to Lawrence, and insist that they have a right to be paid so much of the balance due them from Clarkson as the sale of Clarkson's residence will not satisfy, out of the proceeds of the Western Row property, in preference to the claim of Ludlow. They claim under a mortgage of indemnity to Lawrence, but do not show that Lawrence has ever been damnified. They have never set up any claim against Lawrence as liable to them. We do not undertake to say whether, if they had set up such a claim, they could have succeeded. Lawrence was their friendly uncompensated agent. Their subsequent declining to receive compensation for some services rendered him, does not affect his character. He was only liable, then, for gross negligence. No fraud is imputed to him. His character is too high for that. His intentions are allowed to have been honest. But it is enough that Grant & Stone never set up any claim. It is very plain that they never intended to set up any. If they could get anything through the mortgage, they were willing to do so; but they never thought of prosecuting Lawrence for negligence. This circumstance is fatal to their claim under the mortgage, and makes it needless to consider others.

Grant & Stone also claim to set up the equitable mortgage against the Lafayette bank. We think notice to the president of a bank is notice to the bank. But in this case, the notice was of a canceled, surrendered mortgage, not of an existing equity. It is objected that the surrender was without authority; but the whole matter of security was confided to the direction of Lawrence, and his authority was unlimited. Were the doctrine of notice applicable to the case, therefore, we should hold that the Lafayette bank was unaffected by any right of Grant & Stone under the equitable mortgage, in the surrender of which they acquiesced from the time they were advised of it in 1839, until the filing of their amended and supplemental answer in this cause in 1844. But in Ohio the first recorded mortgage is the first lien, although the mortgagee may have had notice of a prior unrecorded mortgage. This is expressly decided in *Stansel v. Roberts*, 13 Ohio Rep., 155. It is contended that this rule applies only to mortgages executed in due form of law. We are unable to perceive a reason for this limitation of the rule. If a notice of a prior mortgage, executed in due form, will not avail against a subsequent mortgage first recorded—much less, we should think, would notice of a mere memorandum, purporting to be a mortgage, avail against a subsequent legal mortgage duly recorded. On the whole 333
we are of opinion that the plaintiffs are entitled to a decree.

JUDGE WALKER, *Editor of the Law Journal*.

DEAR SIR: I have examined the manuscript report of the case of *Ludlow's Admr. et al. v. Grant & Stone et al.* The report was prepared under the eye of my brother Chase, and I do not think the statement of facts entirely correct and impartial. I by no means impute any unfair intent. But the case is important and the zeal of counsel great. It can therefore hardly be expected that counsel on either side could make a report satisfactory to the other.

Not concurring in the statement of facts, I decline making any alteration or addition to the report of the *points* made by my colleagues and myself. As the cause is to be appealed to the supreme court, is it proper to publish the report now?

Yours truly,

J. L. MINER.

CINCINNATI, *March 17, 1845.*

369

LIABILITY FOR EXPLOSION.

[Superior Court of Cincinnati.]

ANDREWS AND WIFE V. POWELL.

Liability of the owner of a foundry, for injury caused by the explosion of a boiler.

An explosion took place by the bursting of the boiler of the steam engine in the foundry of Mr. D. A. Powell, on Butler street, by which the building of the foundry was much shattered, and several persons in the neighborhood more or less injured. Among those injured was the wife of a Mr. Andrews, whose arm was broken by the fall of the timbers and rubbish of the foundry, while sitting in the kitchen of her own house, near the foundry. This suit was brought by Andrews and wife, to recover damages for the injury thus received. The declaration charged that the defendant carelessly and negligently used a boiler for the generating of steam, wholly unsafe and unfit for that purpose; and also, that he employed, as engineer, a *boy* wholly unqualified for that business, and that, in consequence of said unsafe boiler or improper engineer, said explosion took place, etc. The trial occupied several days, and many witnesses were examined to prove the unsafeness of the boiler and the incapacity of the engineer. Witnesses were also examined on the part of the defendant, to show that the boiler was fit for the use to which it was applied, viz.: To generate steam for *blasting*, a few hours each afternoon, and that the boy was competent, under the general superintendence of the foreman of the shop, to act as engineer. The court charged the jury, that if they were satisfied from the evidence that the boiler, or any part of the engine, used for the purpose of generating and managing steam, was so unsound as to be dangerous and unfit for the purpose to which it was applied, and that in consequence of such unsoundness, the explosion took place, they would give a verdict for the plaintiff; or, if an inexperienced and careless engineer was employed in the management of the engine, and the accident happened in consequence of any inattention or carelessness on his part, that then they would also find for plaintiff. And the judge held that all persons, using the power of steam, were bound to have good, sound and suitable apparatus for the purposes of generating and controlling the steam, with all the usual safeguards, and that they were also bound to employ skillful and proper persons to superintend the operations of any such engines, and in case of neglect of either, they were responsible for damages to any one injured in consequence of any neglect of these duties. The jury brought in a verdict for the plaintiff of \$350. Defendant gave notice of appeal.

Brown & McLean, for Plaintiffs.

Fox & Lincoln, for Defendant.

DOWER.

376

[Superior Court of Cincinnati, January Term, 1845.]

PARMELA VATTIER V. GARRARD R. CHESELDINE.

[Reported by the EDITOR.]

This court feels bound in all cases by the decisions of the supreme court; and, although there may be some doubt of the correctness of the decisions of that court in *Good v. Zercher*, and in *Silliman v. Cummins*, on the subject of curative laws, they must stand as authority until reconsidered by the same court.

The estate, of dower as at common law, has existed here from the organization of the Northwestern Territory, modified, however, from time to time by statute.

The repealing clauses in the several acts relating to dower, from 1805 down to 1824, without any express saving of pre-existing rights, do not take away such rights, because each act contains in itself a saving clause, by the most clear and manifest implication.

This was a petition for dower. From the petition, answer and proofs, the following facts appeared: Complainant was married to Charles Vattier in 1796, and the coverture continued until 1841. The seizin of the husband in the premises in question, commenced in 1803, and terminated in 1807; but the wife did not unite, to relinquish dower, until 1818. In this deed the certificate of acknowledgment is as follows:

"*State of Ohio, Hamilton County, ss.* Came personally before me, the subscriber, a justice of the peace in and for said county, Charles Vattier and Parmela Vattier, who, separate and apart, acknowledged the foregoing instrument to be their voluntary act and deed. May 9, 1818. ETHAN STONE." [SEAL.]

Spencer & Corwine, for the petitioner, in opening, cited *Brown v. Farran*, 3 Ohio, 140; *Connell v. Connell*, 6 Ohio, 353; and *Meddock v. Williams*, 12 Ohio, 377, to show that the above acknowledgment is not sufficient to bar dower; and *Good v. Zercher*, 12 Ohio, 364, and *Silliman v. Cummins*, decided at the last term of the court in bank, to show that the curative act of 1835 did not heal defective acknowledgments previously made, being as to them unconstitutional. They also denied that the above acknowledgment was within the words of that act, which included only a deed, "heretofore executed in pursuance of law," where the magistrate did not certify that "he read or made known the contents of such deed." They insisted that there were other fatal omissions in this certificate, besides that of not making known the contents of the deed.

V. Worthington, for the defendant, did not now propose to call in question the decision in *Good v. Zercher*, and *Silliman v. Cummins*. Though he believed them wrong, they were binding on this court. He placed the defense on another ground—namely, the repeal of the law under which the right of dower commenced, after the seizin of the husband had terminated, without any saving clause. He gave the following history of legislation upon the subject. The ordinance of 1787 simply recognized the common law right of dower, until it should be regulated by statute. The territorial act of 1795 merely provided for

the assignment of dower. The act of 1804 simply makes dower a statutory right. The act of 1805 does the same, and repeals all other laws. The act of 1816 does the same, and without any saving clause. The act of 1824, which is the one now in force, does the same, and without any saving clause. The administration laws simply provide for assigning dower, but do not create it. The argument then stands thus: Dower in Ohio is merely *a creature of the statute*, 2 Ohio Rep., 71; 8 Ohio, 464; 11 Ohio, 221; 4 Kent's Com., 35. During coverture it is *inchoate*, and does not vest until the husband's death. 8 Ohio, 464. Being thus a creature of the statute, and inchoate, it is subject to the legislative will, and may be repealed or modified at pleasure. Suppose there had been no dower prior to the act of 1824. As the husband's seizin terminated before this time, there would be no pretense that the wife could claim dower; for the seizin must not only exist during coverture, but during the operation of the law creating the right of dower. Is the present case different in principle? The act of 1824 repealed all former laws giving dower, and without any saving of pre-existing rights. The case then is the same as if there had been no pre-existing right. The constitution has determined how far vested rights are inviolable by legislation; but this is not a vested right, and no constitutional question is involved. The only question is, as to the effect of the unconditional repeal by the act of 1824; and the case of *Butler v. Palmer*, 1 Hill's Rep., 324, which contains a very thorough review of all the cases upon the effect of repeal, decides that all inchoate rights, derived under a statute, are lost by its repeal, unless saved by express words in the repealing statute. The conclusion is, that the act of 1824 takes away dower in all cases where the seizin of the husband had previously terminated.

Mr. W. also suggested another point—namely, that the healing act of 1835 might be regarded as a mere modification of the dower law, which he had before shown to be fully within the competency of the legislature; but he did not dwell upon this point.

Messrs. Spencer & Corwine, in reply, insisted that dower was not such a right as could be taken away by repeal, even if the intention so to do were expressly declared. But, so far was this from being true of the several dower statutes, that they all clearly contemplated the preservation of pre-existing rights.

ESTE, J., sustained the views taken by the council for the petitioner, and in his opinion (with which I have not been furnished), laid down the positions stated in the beginning of this report.

TENDER AND PAYMENT.

[Supreme Court of Ohio, Meigs County, March Term, 1845.]

Before Wood, C. J., and Birchard, J.

PARSON FOR USE OF M'CURE V. BRODLEY & ROBINSON, IN ERROR.

[Reported by SIMEON NASH.]

If an agreement contains two different places for payment of specific articles, connected by a disjunctive particle, the payment, or tender of payment ought to be made altogether in either of the places, at the choice of the debtor.

A tender, in discharge of a note to be discharged in lumber at one place or another, must be made in whole at one place or the other. A tender of a part at each place is not sufficient.

This was an action of debt on a note under seal, whereby the defendants obligated themselves to pay the plaintiff or order, fifty-five dollars (\$55), to be discharged in lumber, and delivered at M'Master's or Brailey's mill, on or before the 1st day of June, A. D. 1844. With the plea of *non est jactum*, the defendants added two notices—the first stating a tender of a sufficient amount of lumber at the time at Brailey's mill; the second stating the tender of a part at Brailey's, and the balance at M'Master's mill.

On the trial in the common pleas, as appeared by a bill of exceptions in the case, the defendants proved that on the 1st day of June, 1844, they had at Brailey's mill, lumber measured out and set aside to pay this debt, to the value of about \$45, and that the balance of the lumber, to the value of \$10, was measured out and delivered at M'Master's mill. To the admission of this evidence, the counsel for plaintiff objected; but it was admitted by the court of common pleas, and a verdict and judgment rendered for defendants under the statute. To reverse this judgment, the plaintiff sued out this writ of error.

Nash & Bradbury, for the plaintiff, contended that the court erred in admitting the evidence; that the contract was in the alternative, and could not be complied with, save by a tender of the whole amount at the one place or the other. The doctrine of the civil law is clear on this point. In 1 Pothier on Oblig., 120, it is said, that if the places of payment are connected by a conjunctive particle, the payment ought to be made by a moiety in each place; if by a disjunctive, the payment ought to be made altogether in either of the places at the choice of the debtor. 402

Vinton & Simpson, for defendants, insisted that the condition as to the manner and place of payment was for the benefit of the obligors, and should be construed liberally for their benefit.

The court said it was true that the right to discharge in lumber in the manner stated in the obligation, was inserted for the benefit of the defendants; but this did not relieve them from complying with the terms of the contract. Whatever the contract was, that the defendants must fulfill. Here the agreement was to deliver this lumber at Brailey's or M'Master's mill. Did this mean that the defendants might deliver a part at one place and a part at the other? or, that the whole amount should be delivered at the one or the other mill? We think the latter construction is the only one which can be put upon this agreement, unless language is to have a different meaning in a court of justice from what it has elsewhere. We therefore think the evidence improperly admitted, and reverse the judgment below.

EXEMPTION FROM EXECUTION.

[Supreme Court of Ohio, Lawrence County, March Term, 1845.]

Before Wood, C. J., and Birchard, J.

DONAHUE V. STEELE.

[Reported by SIMBON NASH.]

A field of standing corn is not provisions actually prepared and designed for the sustenance of the debtor's family.

The sixty days for which food for animals may be preserved, date from the levy of the execution, and unless claimed and set off at that time, it can never be done afterwards on a *vendi*. for the sale of the property.

A field of corn was levied upon on the 2d of June; *vendi*. for sale on the 24th of September. Defendant in execution, just before the sale, required the constable to set off the same as food for his cattle, and provisions for his family. *Held*, in an action by the debtor against the constable, that he was justified in refusing to do it.

This was an action on the case. The declaration averred that the defendant was a constable at a certain time, and had in his hands an execution issued against the plaintiff, and had levied the same upon a
403 field of corn, and that the plaintiff notified the defendant that he had a family, and that he required the defendant to set off to him, under the statute exempting certain property from execution, the said field of corn, or a necessary amount thereof, for the sustenance of his family and as food for his animals, which the defendant refused to do. The defendant pleaded not guilty, and the issue was submitted to a jury.

The evidence offered by the plaintiff showed, that in the spring he had planted a field of corn; that he had no other means of providing sustenance for his family and animals; that the field of corn was needed to feed his family and animals; that the defendant was a constable—had levied upon this field of corn upon the 2d day of June, and returned the execution without selling the corn; that a *vendi*. came into his hands in September following, and that he had advertised the field of corn for sale on the 24th September. Just before the day of sale, the plaintiff in this case required the defendant to set off the said field of corn as food for his animals; and provisions for his family. The constable refused to do it, but proceeded to sell the field of corn, and sold the same to the plaintiffs in execution, who gathered and carried away the corn.

Byington, for the plaintiff, claimed that the field of corn was provisions actually prepared for the sustenance of the family; that, unless the court so held, poor men would have no means of sustaining their families; that the cornfield was as important to the poor man as his flour barrel to the rich.

S. M. Tracy & Nash, for defendant, made two objections to a recovery—1st, that the selection of provisions or food for animals, must be made at the time of the levy, and if not made then, could not be made afterwards; 2d, that corn in the field was not provisions, actually prepared and designed for the use of the family. By no course of reasoning, could grain, growing or standing in the field, be called *provisions*, prepared for the sustenance of a family. One of the counsel said he recollected when the act of 1840 was passed, and the reasons for the change that was then made in the law; under the act of 1831, furniture and cooking utensils were exempt from execution; but nothing was said

as to provisions; a pot and plates were allowed to the debtor, but nothing to boil in the one or to be eaten from off the other. He said he remembered a case, referred to in the debate upon the bill, said to have occurred in the city of Cleveland, where a mousing attorney and a constable actually levied an execution against a father upon a wedding supper of a daughter, just as the guests were about to sit down to the luxuries provided by the industry of the bride herself. To obviate this omission in the former statute, this provision was introduced, and carefully worded, so as to cover nothing but what was in the house prepared and set apart as provisions.

BIRCHARD, J., charged the jury to the following effect: He said that all the articles exempt by name from execution, the constable or other officer was bound at his peril not to levy upon; but, when a selection was to be made by the debtor, then, if the debtor did not 404 insist upon the benefit of the statute, the officer was not bound to set apart the articles. Hence, in regard to such property, the debtor must make his election at the time of the levy; and if he did not do it then, he could never do it afterwards; when once the officer had taken the property into his custody, it was in the keeping of the law, to be applied in satisfaction of the execution.

As to food for animals, it must be also demanded at the time of the levy; for the sixty days spoken of in the statute must date from the time of the levy; and, if the debtor did not need the food for his animals at that time, he could not claim it at any subsequent time, however much he might need it, even if the property remained unsold. He said further, that corn in the month of June, when this levy was made, could not be food for animals, and so not subject to be so applied, even if the debtor had claimed it at that time.

The provisions for the family must also be claimed at the time of the levy. If the debtor's family do not require the provisions at that time, no change of circumstances could give him a right to have any portion of it set aside thereafter. Otherwise, when goods remained unsold, the debtor might set up a second claim, when he had consumed the first allowance.

He said further, that, to constitute *provisions actually prepared and designed for the use of the family*, the articles must have been taken into the house, and set apart for that purpose. The debtor must not only have articles which may be provisions, but he must actually have prepared and appropriated them to that use, to the use of his own family. Otherwise, the keeper of a provision store might insist that the articles in his store were provisions actually prepared and designed for the use of his family. By no reasonable construction of language could grain or corn, standing in the field, be called *provisions*—much less provisions actually prepared and designed for the use of the debtor's family.

• *Verdict for defendant.* A motion for a new trial was made and overruled by the opinion of both judges. Judgment on the verdict.

408

AFFIDAVIT FOR BAIL.

[Supreme Court of Ohio, Gallia County, March Term, 1845.]

Before Wood, C. J., and Burchard J.

GATES V. MAXON, KERR & CO.

[Reported by SIMON NASH.]

In an affidavit to hold to bail, the existence of the debt must be positively sworn to; but the fact of nonresidence, of an intention to remove, of the possession of choses in action which the debtor refuses to apply to the payment of the debt, etc., may be stated according to the belief of the creditor.

When the suit was commenced by a *capias ad respondendum*, and defendant held to bail, a *ca. sa.* cannot issue on a judgment obtained without a new affidavit.

The affidavit of the party, without other testimony, is not sufficient to authorize the issue of a *ca. sa.*

This was a *certiorari* to reverse an order of the common pleas, refusing to discharge the plaintiff from custody on a *capias ad satisfaciendum*. The bill of exceptions set forth the affidavits in full. The first was the affidavit of a witness stating that plaintiff in *certiorari* had told him he had certain notes; that he had refused to let him have them, as agent for plaintiffs in the execution, in payment of the judgment; that he believed he had them still, and unjustly refused to apply them. One of the plaintiffs made an affidavit as to the existence of the judgment, that it was unpaid, and that the said Gates had notes which, as the affiant justly believes, the said Gates unjustly refused to appropriate in payment of said judgment. The bill of exceptions presented other questions, which are not here reported.

Nash for plaintiff, referred to the authorities on the subject of an affidavit to hold to bail, which may be found well digested in Judge Swan's article, 1 West. Law Journal, 196; 1 do. 359.

Coombs for defendant.

The court held that the affidavit was sufficient; that any other construction of the statute would operate to repeal it. The fraudulent intent, which gives the right to arrest, could be known with certainty only to the debtor; the creditor could only swear as to *his belief*. He must, however, be sure that his belief is founded on sufficient grounds: otherwise he might be sued for a malicious arrest, if not indicted for perjury.

The court said that they had decided, in Muskingum county, that the affidavit of the party was not sufficient to warrant the issue of a *ca. sa.*; but that there must be other testimony, the affidavit of at least one other *witness*, not a party in interest. In Athens county, at the last November term, it was decided that, where a party had been arrested on mesne process, and held to bail, a *ca. sa.* could not issue on the judgment without the filing of a new affidavit with other testimony, and that a constable, into whose hands a *ca. sa.*, so issued without a new affidavit and other testimony had come, was not liable to the plaintiffs in execution for neglecting to serve the same.

BAIL FOR STAY OF EXECUTION.

406

[Supreme Court of Ohio, Gallia County, March Term, 1845.]

Before Wood, C. J., and Birchard, J.

DANIEL G. WHITON V. AMOS RIPLEY.

[Reported by SIMON NASH.]

A plea of *null tiel* record is not such a general issue, as that, under our statute, a notice of special matter can be attached to it.

An insufficient or improper notice may be taken advantage of, either by a motion to strike it from the case, or by objecting to the admission of any evidence under it.

The sending instruction by the plaintiff in execution to the justice, on the return of a *vendi*, with the property named in it sold, that he need not issue another execution until further orders, is not such an act as will discharge the bail for stay of execution, though the execution debtor, before the issue of another execution, becomes insolvent.

Bail for stay of execution is to be governed by the same principles which govern the relation of surety in other cases.

This was a writ of error, brought to reverse a judgment of the common pleas in this county. The action was originally commenced before a justice, and was a *scire facias* against bail for the stay of execution on a judgment rendered before the justice issuing this writ. The case was appealed to the common pleas, where the plaintiff filed his declaration against the said defendant as bail for the stay of execution on a certain judgment named. The defendant filed the plea of *null tiel record*, to which he attached a notice of special matter, stating in substance, that the defendant in the original judgment, had property sufficient to satisfy the judgment; that the said plaintiff had levied upon certain property, and had caused the same to be sold; that, at the time of the return of the *vendi*, on which the said property was sold, the plaintiff, at the request of the execution debtor, wrote a line to the justice, directing him not to issue until further orders; and that, before another execution was issued, the judgment debtor had become insolvent. A second notice was added, stating that the plaintiff agreed with the judgment debtor to give him six months' delay before proceeding to enforce the collection of the residue.

The record showed that a motion was made to strike these notices from the file; 1st, because the plea of *null tiel record* was no such general issue to which a notice could be attached; 2d, because said notices were insufficient in law to bar the plaintiff's right to recover.

The court below overruled this motion; and the case was submitted to the court on the issue joined. The record showed that the plea of *null tiel record* was found for the plaintiff, and that the defendant, under his notices, proved that at the time of the sale on the *vendi*, the judgment debtor applied to the plaintiff to give him time until fall for the payment of the balance, when he thought he could pay it himself; that on this request the plaintiff wrote to the justice that he need not issue another execution until further orders; but that there was no consideration for any delay, and no promise for a delay further than the writing of the above note to the justice. It was proved that the judgment debtor was now insolvent, to the admission of which evidence the plaintiff excepted, which objection the court overruled, admitted the evidence, and rendered a judgment for the defendant. To reverse this judgment, this writ of error was prosecuted.

Nash, for the plaintiff, contended that the notice was improperly attached to the plea. They were wholly incompatible with each other; the plea being, to be tried by the court and the facts stated in the notice, having to be tried by a jury; and when, therefore, the plea is disposed of by the court, there is no issue for the jury. Otherwise, the plea must draw after it the trial of the facts set up in the notice, thereby depriving the party of his right of trial by jury; or, on the other hand, the absurdity must be exhibited of submitting a plea of *null tiel record* to a jury—an absurdity that the common pleas were driven to defend by refusing to strike out the notice.

He further insisted that the law was well settled, that no mere delay on the part of the creditor could discharge the security. *Vide* Story on Bills, 499, § 425; Chitty on Bills, ch. 9, 441, 444; 2 Bos. & Puller, 61; 8 East R., 187; 16 J. R., 70; 9 Cowan R., 190; 6 Peters's Rep., 250; 6 Mass. Rep., 85; Story on Bills, 502, § 425, and note 2; 5 Barn. & Ald., 187. This court, at its last term in bank, held the same doctrine. 2 Pick. Rep., 581; 1 Gallison, 35; 15 J. R., 433; 17 do., 176; 1 Holt, N. P. cas., 87.

There is nothing in the distinction taken by the court below, that bail for stay of execution is governed by a different rule. A surety is such, whatever the form of his contract. 3 Black. Rep., 92, *Naylor v. Moody*; 1 Leigh's Rep., 434; *McKinny's Ex. v. Waller*.

Cushing, for defendant, insisted that *null tiel record* was called in the books a *general issue*, and by our statute a notice could be attached to a plea of the general issue. On the other point no authorities were cited.

The court said that the notice should have been stricken out; it was incompatible with the issue tendered by the plea. The plea, to which a notice of special matter can be appended, must be one which presents an issue to a jury. The facts averred in the plea, and set forth in the notice, must both be such as are to be tried by the same tribunal, as the notice is no issue of itself, but follows, for the purposes of a trial, the issue presented by the plea to which it is attached.

The facts stated in the bill of exceptions, show mere delay on the part of the plaintiff. This, it has been constantly held, would not discharge a surety. The court, at its last term in bank, decided that, to discharge a surety, the creditor must have, by contract upon a good consideration, agreed to give time—must have suspended his remedy
408 for a definite term of time, so that the surety should be deprived of his right to pay up the debt, and proceed at once against the principal. Here nothing of this character was done; nor is there any force in the distinction that a bail for stay of execution is not governed by the same law as any other surety.

The court said that the practice of striking an insufficient notice from the files, on motion was undoubtedly correct. Like a demurrer to a plea, it raised the question as to the sufficiency of the notice. If this was not done, the party had a right to object to the admission of any evidence under it; and, if admitted, present the question on a bill of exceptions.

OHIO SUPREME COURT.

426

SOME POINTS DECIDED AT THE LATE TERM OF THE SUPREME COURT IN CINCINNATI, COMMENCED ON THE 14TH OF APRIL, AND ENDED ON THE 17TH MAY, 1845.

[By the EDITOR.]

THE STATE V. CARVER—*Challenge*. Held, that the state has no peremptory challenge in a capital case.

THE COMMISSIONERS OF HAMILTON COUNTY V. PHILLIPS—*Counsel fees for defending indigent prisoners*. Held, that where the court of common pleas assign counsel to defend an indigent prisoner, and fix the amount of compensation, it is binding on the county commissioners.

CLARK V. PULLMAN—*Affidavit for a capias ad respondendum*. Held, not to be sufficient to state generally, in the language of the statute, that the defendant is about to remove, etc., or has converted his property, etc.; but the particular facts must be stated, from which the general conclusion is deduced; and even then there must be other evidence to establish such facts.

BRISBANE V. STAUGHTON—*Mortgage—Infant*. An infant heir of the mortgagor, not made party to the bill of foreclosure, may be required by the purchaser to redeem within a reasonable time; but such purchaser must account for the rents and profits up to the time of redemption.

LANMAN'S ADMR. V. PIATT—*Evidence*. Held, that where a witness was competent at the time of giving his deposition, but became incompetent by reason of interest before the trial, such deposition may be read. Also, that where a wife was divorced from her husband on the ground of extreme cruelty, and such fact is found in the decree, the record is not evidence of such fact in a suit by her father against the husband for her maintenance between the time of separation and divorce. Whether the wife is a competent witness in such suit, to prove such cruelty, *quære*, the court being divided in opinion.

MUZZY V. COMMISSIONERS OF HAMILTON COUNTY—*Compensation for a post-mortem examination before coroner*. Plaintiff was called by the coroner as a physician to examine the bodies of two men who had been stabbed several days before their death in a notorious manner. He charged \$20, which the county commissioners refused to pay. Held, that the coroner has no power to hold an inquest except in cases where the cause of death is unknown; and that even then a physician can only charge the ordinary fees of a witness.

HILL V. THE STATE OF OHIO. Held, that where an indictment for murder charges a mortal blow on the 24th of the month, and death on the 28th, and then avers that the murder was committed on the 24th, the indictment is bad. 427

FERREL V. FERREL—*Divorce*. Defendant lives in Clark county, Ohio. His counsel acknowledged service more than six weeks before the term, and filed his answer. Held, that the statute requiring either personal service or advertisement, is peremptory, and cannot be dispensed with.

NOCK & RAWSON V. MILLER—*Appeal*. There had been a judgment in the court below, and a notice of appeal entered on the journal before

the passage of the law taking away appeals in actions at law; but the bond was not given until after. Held, that the appeal was saved.

NOTE. I have made every effort in my power to obtain statements of other points of which I was not personally cognizant. The docket was so large, that not more than half of the business could be disposed of, otherwise than by continuance. But it is evident that many more points of interest to the profession, must have been decided. That I am unable to publish them, must be attributed to one of two causes. Either the lawyers concerned were too much occupied, or else too indifferent to the interests of the profession, to furnish them for publication.

445

TURNPIKE STOCK.

[Supreme Court for Butler County, Ohio, May Term, 1845.]

Before Judges Hitchcock and Read.

AUDITOR OF STATE OF STATE OF OHIO, FOR AND ON BEHALF OF SAID STATE, V. WILKINSON, BEATTY, ET ALS. AND HAMILTON, SPRINGFIELD AND CARTHAGE TURNPIKE COMPANY. IN CHANCERY.

[Reported by C. H. BROUGH.]

The subscription by the state of Ohio to stock in turnpike companies, under the law of 1837, is a qualified and not a general one; and the state is therefore entitled to be paid her share of tolls in preference to any creditor for work done in constructing the road.

This was a bill in chancery, in the court of common pleas of Butler county. It set forth that Beatty, before the time of its being filed, viz: on the 4th day of March, 1842, exhibited his bill in chancery in the same court, setting forth a claim against the Hamilton, Springfield and Carthage Turnpike company, for work done in its construction, which he had previously prosecuted to a judgment at law, and sued out execution, upon which return was made "*nulla bona*;" that said company 446 owned several miles of turnpike road in the county of Butler, upon which they had erected gates, and were receiving tolls; and praying the appointment of a receiver, and the application of said tolls to the payment of his claim. At the following May term, as was alleged by the bill in this cause, a decree was entered up in favor of Beatty upon his bill, finding among other things, that the state of Ohio was a stockholder in the company under the provisions of the act of March 24, 1837; appointing a receiver, and directing him, of the money he should collect, first to pay the expenses and necessary repairs on the road; next to pay over into the treasury of state, upon the order of the auditor of state, the amount due to the state in proportion to the payments made upon her stock subscribed; and the balance, after deducting costs of suit, to pay over to the complainant, Beatty, upon his claim. [This decree was precise'y conformable to the act of March 5, 1842, 40 O. L., page 37, "an act to provide for the collection of claims against turnpike companies, in which the state is a stockholder."] The bill alleged that instead of following the directions of this decree, the receiver at the next term, brought into court the money collected in the interval, and by an interlocutory order of court, was directed to and did pay the *whole*

of it over to the claimant, Beatty, less the sum allowed for expenses and necessary repairs; that at this and the next subsequent term, other claimants came in under the Beatty decree, and that the same course of payment was followed, without regard to the interests of the state, up to the filing of this bill, in August, 1843. The prayer of the bill was for an injunction upon the receiver, from paying out any more of the money he had in hand or might receive; that the rights of the state to her proportional share of tolls might be adjudged to her, and thus she should be reimbursed, before any further payments made, for her said share of the tolls, so before received, and improperly paid without regard to her interests. An injunction was allowed in accordance with the prayer of the bill. A demurrer and joinder were put in, and thus the case stood in the common pleas. But as the "law's delay," from want of time, and presence of other business, was strongly operative in that court, and as Judge VANCE, who presided, could not sit in the case, from interest as a stockholder, the solicitors on both sides agreed to take it up out of its order, and decree was entered against the state, and appeal to supreme court. The cause came on for hearing at the late term of the supreme court for Butler county, before Judges READ and HITCHCOCK, upon the demurrer and motion pending to dissolve the injunction. The question, whether the state was entitled to her proportional share of tolls before the payment of the company's debts, was then broadly made, and was the only question in the case.

Messrs. Bebb & Campbell, in support of the demurrer and motion, argued that when a state became subscriber to the stock of a corporation, she waived her sovereignty, and took equal character and responsibility with her co-stockholders, and that the relation of costockholders was one of perfect equality, arising by contract. They cited *Planters' Bank of Ga.*, in 9 Wheaton's R. They also argued that the law of March 24, 1837, was general, and contained no limitation as to the liability of the state, growing out of her becoming a stockholder. The 14th section of that act provides that the state shall be entitled to dividends upon the *profits* of said road; and the word "*profits*," they maintained, could only apply to a surplus, over and above the payment of all debts and liabilities of the company. The act of March 5, 1842, they contended, was in contravention of the law of 1837—violative of equity and private right, unconstitutional, and was *repudiation* in the most odious form. Here was a case in which the court has in its own hands the money to pay creditors who had built the road, and they insisted the money should be so applied, and the claim of the state, for her proportional share of the tolls, be left for adjustment with the company hereafter—at all events, that she should not be preferred to these creditors.

Brough & Zinn, for the state, conceded that a general and unqualified subscription of stock by the state, would have imposed upon her equal liability with private subscribers; but insisted that the terms of subscription in this case were qualified, and wrought a complete limitation in behalf of the state. Cited *Seymour v. Milford* and Chillicothe Turnpike company, 10 Ohio, 483-4. This qualification, they urged, was general, was spread upon the statute book, and was a matter of which these claimants, not merely *might* take notice, but were *bound* to take notice.

They urged that the history of the act of March 24, 1837, the so-called "*Plunder Law*," and the arguments of its framers and friends, as well as the terms of the law itself, showed that it was designed to qualify and limit the stock subscription of the state.

Sections 8 and 9 of that law, [see Stat. 559, note (a)] provide that an estimate shall be made of the cost of constructing a given road, or portion of road; that proof shall then be furnished to the state authorities that individual subscriptions have been made to the amount of one-half of such estimate and one-fourth part thereof paid into the treasury of the company; the state shall then subscribe stock to the amount of one-half of such estimated cost, and shall pay as fast as individual stockholders pay. The obligation of the state, then, is to subscribe one-half of the estimated cost, and pay this subscription as fast as individual stockholders pay. These were the *criteria*; beyond these the liability of the state could not be carried. And it was neither to be supposed that the estimate would be incorrect and insufficient, nor that the money would be misapplied. The presumption of law is to the contrary; and, as a consequence, it results that the legislature contemplated that the payment by the state of her half, and by individuals of their half of the estimated cost, would furnish means to complete the road, and that it would be so completed, and not a dollar of debt left outstanding. Hence, the use of the word "*profits*," in the 14th section, which, construed with the whole act, had all the meaning of the word *proceeds* or *tolls*.

448 It could make no difference, if the estimate were incorrect, or the money misapplied, as to the liability of the state. She subscribed to the capital stock of a corporation, actually and perfectly *in esse*, and *in aid* of such company. She had agreed to subscribe one-half of the estimated cost, and *had done so*. She had agreed to pay as fast as individuals paid; and this too, it was not controverted, *she had done*. Here was an end of her liability—it could be carried no further.

The act provisionally repealing the "Plunder Law," Stat. 559, and the amendatory act of March 21, 1840, Stat. 563, were cited and commented upon. The provisions of these acts are fully reviewed in the case of Seymour in 10 O. R. to which reference has already been made. It is in respect to these acts, that the supreme court, in that case say, they are of the same binding force and efficacy of other laws and "*must be enforced*." The act of March 5, 1842 (which, it was suggested, owed its origin to the intimation thrown out in a paragraph of this decision, upon the 486th page of the volume), was mainly directory and remedial, and advanced no proposition which had not been considered and affirmed by the court in Seymour's case. Hence, it was contended, the constitutionality of the latter act was a matter already adjudicated and settled.

They denied that the court had the money in question, in control, so as to divert it from the course of payment prescribed by this act, under which, it was manifest, from the form of the original decree in Beatty's case, the receiver had been appointed.

As to the matter of *repudiation*, that supposed an *obligation* as well as a refusal to pay; and the state was under no obligation to allow her proportional share of tolls to be applied to the payment of debts, for which she had never undertaken or contemplated to become liable. To subject them in that way, without liability on her part, and sufficient warrant in law, would be *confiscation*. Moreover, the state having borrowed the very money she had paid in upon her subscription of stock to the company, had sacredly set apart her proportional share of these tolls, to pay the interest upon that borrowed money. Stat. 564, section 5. One of two consequences must result, therefore, from diverting this share from the course provided by law: Either first, there must be actual and flagrant repudiation by the state, and disgrace to the good name, which,

under all rule, in bad times, and under the influence of bad examples, it had been her highest honor to preserve unspotted; or, secondly, heavier taxes must be levied upon the whole state to fill up this deficit in the interest of a fund, which had been notoriously seized and enjoyed by particular and more wealthy locations. And it was by no means impossible that, from the injustice of such increased and most onerous tax, the people of the state should be found ready to rush to the still more monstrous injustice of actual repudiation.

The Court, Judge READ, delivering the opinion, commented upon the act of 1837, and the subsequent laws prior to that of 1842. *Held*, that, by the terms of the first of these acts, a qualified subscription was made on the part of the state; that she became, not a general stockholder and member of the association, upon an equal footing with private stockholders, but had taken care to limit, and had limited her liability in the premises. That the word "*profits*," in the 14th section, construed with the whole act, must be taken as having all the force of the word *tolls*, and operated and express reservation of the state's proportional share of tolls. In relation to the act of March 5, 1842, the court had no doubt of its constitutionality, and supposed it clearly based upon the previous legislation referred to. And as no reason existed for setting that act aside, its provisions must be enforced by the court, and would govern this case. 449

Decree. That receiver make full and particular report within twenty days to the auditor of state, and pay upon the order of the latter into the treasury of state, the state's proportionual share of tolls, allowing for expenses and necessary repairs. That, of the money now in hand, and of that first hereafter received, he pay over also the arrearage due the state, on account of payments made heretofore to creditors without regard to her interest, until she shall be completely reimbursed. That, as to all payments to creditors, until that be done, the injunction be continued; and, as to all payments to creditors or any other persons, of the state's proportion of tolls, the injunction be made perpetual.

AFFIDAVIT FOR BAIL.

499

[Superior Court of Cincinnati, June Term, 1845.]

ROBERT ADAMS AND OLIVER HANCHETT V. JULIUS BRACE.

[Reported by CHAS. L. TELFORD.]

Upon an affidavit to hold to bail, the court will not inquire into the truth of the matters of fact sworn to—but when the defendant under arrest presents matters of fact, not contradictory of the affidavit, but in avoidance of it, the court will consider such matters, upon a motion to discharge upon common bail.

Where an arrest was made on the 24th March, 1845, under an affidavit made, of non-residence on the 28th November, 1844, the court will upon motion to discharge on common bail, hear evidence to prove that on the day of the arrest, the defendant was a resident, and if that fact is made out, the court will discharge upon common bail.

The court, at the appearance term, will hear a motion to discharge on common bail, even although the defendant did not appear on the return day of the writ, and although the plaintiff has taken an assignment of the appearance bail bond.

As to whether a *capias* is well issued on the 17th March, 1845, upon an affidavit made on the 28th November, 1844, *quære*.

This case came up upon a motion made by defendant at the appearance term, to be discharged on common bail.

The material facts appearing upon the motion, were as follows :

On the 28th of November, 1844, the plaintiffs, by their agent, made an affidavit setting forth the indebtedness of the defendant, and that he was not a citizen or resident of the state of Ohio. Thereupon a capias and an alias capias were respectively issued, and were duly returned, "*not found*." On the 17th of March, 1845, upon the old affidavit, a pluries capias issued, and upon the 24th of March, 1845, the defendant was arrested, and gave appearance bail, conditioned as usual.

The return day of the pluries capias was June the 2nd, 1845. The defendant failing to appear, and failing to put in special bail on that day, the plaintiffs took an assignment of the appearance bail bond. On the 16th day of June, 1845, the defendant, after having given notice of his motion to plaintiff's attorney, filed in the court affidavits establishing the fact, that on the day of the issuing of the pluries capias, he was, and that he ever since has been, and now is, a citizen and resident of the state of Ohio, and moved the court to discharge him upon common bail, and to stay proceedings on the appearance bail bond.

Telford for the motion ; *King, contra*.

COFFIN, J. It is clear that if this were a motion for leave to appear and put in special bail, it must be granted at any time during the present term, notwithstanding the assignment of the appearance bail bond.

500 But the defendant does not ask that ; he comes into court, after a default, and asks leave upon affidavits filed to be discharged upon common bail.

The proceedings which have been had in respect to the assignment of the appearance bail bond, present no real difficulty ; for, if notwithstanding the default, the defendant may come in, and put in special bail, he may, I apprehend, appear and show to the court reason, why he ought not to be held to put in special bail. In other words, I am willing to consider this motion, as if it were made open the return day of the capias, before the default accrued.

The real difficulty arises from another view of the case. The practice act, Swan's Statutes, section 43, provides, " that every court and judge shall take the fact to be true, as sworn to in the affidavit, to hold the party to bail, without going into the merits." Now, although the affidavits presented to the court by the defendants, satisfy the court, that upon the day when the pluries capias was issued, and on the day when the arrest was made, the defendant was a resident and citizen of the state of Ohio, and that he has been ever since, and is now a citizen and resident, yet the question arises : Can the court entertain this question, or is it concluded, as to the matter of fact, by the affidavit of plaintiff's agent ?

I suppose the court is bound to take the fact to be true, as sworn to in the affidavit of plaintiff's agent, but from an examination of the English authorities, and after a careful consideration of our own practice act, I am satisfied, that *matter of avoidance*, which does not contradict the plaintiff's affidavit, may be considered by the court upon such a motion as this. Here the affidavit of plaintiff's agent was made on the 28th day of November, 1844, and the pluries capias upon which the arrest was made, did not issue until the 17th of March, 1845, and the arrest itself was not made until the 24th of March, 1845.

Now, without giving any opinion as to whether a capias was well issued upon the 17th of March, 1845, predicated upon an affidavit of non-residence on the 28th of November, 1844, I do hold, that after such a

lapse of time between the affidavit and the process, the court may receive evidence showing that on the day of the arrest, the defendant was not legally subject to an arrest, for it does not necessarily contradict the truth of plaintiff's affidavit. The defendant may not have been a citizen or resident of the state of Ohio, at the date of the affidavit, and yet at the issuing of the writ, and upon the day of the arrest, may have become a *bona fide* resident of the state of Ohio.

The matter set up by the defendant's affidavits, is matter in avoidance of the facts sworn to by plaintiff's agent. The motion must prevail, defendant paying the costs of the assignment of the bail bond, other costs to abide the event of the suit.

TENANTS IN COMMON—RENTS.

501

[Erie Common Pleas, Ohio, June Term, 1845.]

Myron H. Tilden, President Judge.

ROSWELL CONVERSE V. MOORS FARWELL AND BURR HIGGINS, ADMINISTRATORS OF JUDAH W. RANSOM, DECEASED.

[Reported by E. B. SADLER.]

Where two persons are tenants in common, and one to the exclusion of the other leases and controls the property, and collects the rents, he takes upon himself the character, and incurs the duties and responsibilities of a bailiff or trustee.

Under such circumstances, it is his duty to peremptorily demand, collect and account to his cotenant for the rents. If the rents are not paid, or collectible, he should not suffer the rent to accumulate, but should put an end to the lease, and relet the premises, or suffer his cotenant to manage his own affairs.

If he refuses to do this, and suffers the rent to accumulate, and permits the tenant to remain in possession, making no effort to collect the rent, till the tenant becomes hopelessly insolvent, he must account in money for the rent that should have been collected, and cannot require his cotenant to take notes which he received for rent of the tenant.

IN CHANCERY. The bill in this case was filed to compel the administrators of Ransom's estate to account for certain rents for the property known as the Steamboat Hotel in Sandusky City. It appeared, among other things, that Ransom and one Miles A. Bradley entered into a contract with S. Bowman to purchase the premises, took possession, and leased the premises to Ward & Stiles, for a term of years at \$500 per annum. F. Hull took an assignment of the lease from Ward & Stiles, agreeing to pay the rent according to the terms of the lease. Before the assignment of the lease to Hull, or about that time, Bradley sold his interest in the contract and premises to the complainant. Ransom had his possession in the counterpart of the lease assigned to Hull. He told Hull not to pay any rent to complainant's agent, and refused to let complainant or his agent have possession of the lease, or to collect any part of the rents. Ransom had other dealings with Hull, and mingled his own accounts with those for rents. Hull remained in possession of the premises between fifteen and sixteen months, paid some of the rent to Ransom, but on a final settlement owed Ransom for rent and other things, six or eight hundred dollars, for which he gave Ransom his notes. Ransom kept the notes two or three years without any effort to

collect them, till he died in 1840. On application to his administrators, they offered to turn out to complainant the notes taken of Hull, to the amount of his share of the rent, but complainant refused to accept them, 502 and filed his bill for an account of the rents received by Ransom, and due complainant, and to obtain the amount.

The principal defense set up was, that Hull, during the time he occupied the premises, was insolvent, or under such circumstances that the rent could not be collected of him; that the reason Ransom made no effort to collect the notes was, that nothing could be collected of Hull; that the administrators, after Ransom's death, obtained judgment on the notes, but could collect nothing. Hull has since taken the benefit of the bankrupt law. There was some conflicting testimony as to Hull's responsibility and ability to pay rent during the time he occupied the premises. But Hull and the complainant's agent both swore the rent could have been collected by the complainant, if Ransom had not interposed to prevent it.

E. B. Sadler and W. F. Converse, for complainants.

Beecher & Cooke, for Defendants.

BY THE COURT. In this case we find that Bowman contracted the premises described in the bill, known as the Steamboat Hotel in Sandusky City to Ransom & Bradley; that Bradley assigned his interest to complainant; that the premises were let to Ward & Stiles; that their lease was assigned to Francis Hull, who entered and occupied them; that the counterpart of the lease was in the custody of Ransom; that he collected part of the rents; that he claimed to and in fact did in fact occupy exclusively the relation of landlord; that all the rents that ever were collected from Hull were collected by him; that he interfered for the purpose of preventing, and did in fact prevent Hull from paying to the complainant, and the complainant from receiving any portion of the rents; and that he took to himself the entire management and control of the premises, lease and rents, to the absolute exclusion of his cotenant.

Under these circumstances, it is clear to us that Ransom took upon himself the character and incurred the duties of a bailiff or trustee with respect to the subject matter.

Upon the proof, we think it is very doubtful whether, after the landlord had permitted the rents to amount to the sum of \$500, they could have been collected by suit. But, if Ransom permitted the rents thus to accumulate, especially against a tenant whose irresponsibility is the sole ground of defense, the defense itself comes with a very bad grace. The rent was payable quarterly; and when he took to himself exclusively the business of collecting them, it was his manifest duty, as a faithful agent, to demand them promptly—when paid, it was his duty to account to his cotenant; if not paid, it was his duty either to permit the complainant to manage his own affairs, or to put an end to the term, and relet the premises to a responsible person. Instead of that, he permitted the rents to accumulate; he blended his account of rents, actually received, with his own personal affairs, so that it is impossible now to distinguish them; and when these accounts were closed, and notes taken, he permitted them to remain without the least effort to collect them until his death, and Hull became hopelessly insolvent. The defense which is now 503 made for him is therefore entirely inadmissible. We will not inquire what amount he actually did receive, nor whether Hull was insolvent. The real question is, what he *might* have received, if Hull had

paid his rent punctually, or Ransom had let the premises to a tenant who would have done so. Ransom's estate is not even entitled to a compensation for his agency, for it was altogether voluntary. But it is suggested that moneys were expended in necessary repairs. If this be so, the cause ought to go to a master, to ascertain how much was expended; if not, we have the materials before us for a final decree.

A decree was entered for complainant for the full amount of his claim, and the defendants appealed to the supreme court.

LIBEL.

[Superior Court of Cincinnati, June Term, 1845.]

ACHILLES PUGH V. CALVIN STARBUCK.

[The statement of this case was furnished by RUFUS KING, and the charge to the jury by Judge COFFIN, on request of the Editor.]

Words of ridicule or contempt only, will support an action for libel.

Printing and permitting third persons to read, or printing and delivering to a third person, is a publication; and if a printed libel is found to be in circulation, the proof of the printing by the party is evidence from which a jury may infer publication by him.

The proprietor of a newspaper, edited by another, is liable for the publication of a libel in his paper, though made without his knowledge; and all who aid or assist in whole or in part, in unlawfully publishing or making known a libel, as the printer, who, by himself, or those employed by him, in the course of his business, assists in the printing and making it public—or the carriers, who, in the course of their business receive it from the printer, and deliver it to third persons, are responsible for it, and the disclosure of the editor or author will not excuse, though it may be shown in mitigation.

Malice is inferred from the publication of unlawful words.

The constitution of Ohio gives her citizens redress for assaults upon their reputation just as for assaults upon their property or persons, and will punish the authors of such injuries by the wholesome verdict of jurors.

[Case for libelous words printed and published by the defendant of and concerning the plaintiff, in a newspaper called "The People's Paper."]

The words counted upon were parts of an article published in the paper of the 9th of September, 1843, addressed to the plaintiff as follows: "To Achilles Pugh, publisher of the *Cincinnati Chronicle*. Sir—

804 Since you have been a master printer, you have on more than one occasion given unquestionable evidence of your being too unprincipled a man to be countenanced and upheld in an honest community." And the following words, part of the same article: "You shortly afterwards had the impudence to set yourself up as publisher of the *Chronicle* and ask the citizens of Cincinnati to patronize you. Soon finding that the public very properly refused to countenance a man who had violated every title to truth and respectability, you set yourself to work to devise means of intrigue in order to keep your head above water, and save yourself from sinking into that obscurity from which it were better for you and this community had you never emerged. One of these pusillanimous schemes was to underbid other proprietors of daily papers in the prices of subscription, advertising and work. Another was to compel your hands to take the greater part of their wages in trade, and thus to save to yourself about twenty-five per cent of the hard earnings of your journeymen."

PLEA—the general issue—

G. W. Grover, called by the plaintiff, testified that he bought the *People's Paper* daily of Swim, one of the carriers, and kept the file produced in court; that it was published and issued at the "Times Buildings," where the *Times* newspaper, owned by the defendant, was published; that there was no other printing office but that of the *Times* in those buildings; that the selected matter and type of the *People's Paper* and the *Times* was the same; that in conversations with the defendant in reference to this suit, the defendant in one conversation said that he was the publisher of the *People's Paper*, and in a subsequent conversation stated that he did the printing, furnished the paper and received pay for it, and that the question would be "whether the printer of a paper is liable for the editorials." The same witness on cross examination further testified that some offices print several different papers, and that defendant stated that he had no control over the editorial articles of the *People's Paper*, and did not know what was in it. J. M. Campbell, also called by the plaintiff, testified that he was a printer, and that he was acquainted with the *People's Paper*; that he had seen it in the *Times* office, and that in September, 1843, it was printed and published there; that the selected matter of the *People's Paper* and the *Times* was the same, and usually that when papers were printed at the same office for different concerns, they are published at different places. In addition to the paper of the 9th September, the papers of the 14th, 16th, 29th and 30th September, containing similar articles, were put in evidence by the plaintiff, without objection on part of the defendant, by way of showing malice.

For the defendant various witnesses were called, some of whom testified that they worked in the *Times* office in September, 1843—that the *People's Paper* was printed there but that they never saw the defendant interfere with it; that Charles H. Layton was the editor of the paper, and set it up and worked it off himself; that some of the hands in the office occasionally assisted him, but that Layton controlled it, and that Layton was employed as a journeyman in the *Times* office, in August, 1843, when the *People's Paper* was started.

Other testimony was offered on part of the defense, going to show that the Cincinnati Typographical Society, composed of journeymen, and of which Layton was secretary, had about the month of August, 1843, established a bill of wages similar to one established by the old Franklin Typographical Society, and appointed a committee to wait upon the master printers and obtain their assent to it; that all except the plaintiff, who is publisher of the *Chronicle*, consented to allow the bill; but that the plaintiff, when called upon, treated the committee with great contempt; that he continued, notwithstanding their calls, to employ "rats," * in his office, in consequence of which all his journeymen, with one exception, left his office; and those who should remain or work there, were, by order of the society, placarded as "rats," and the office itself published as a "rat office;" that the plaintiff had been, whilst a journeyman, an active member of the old Franklin Typographical Society, and subscribed towards publishing a "rat list," and had said in a speech on one occasion, that if he had the means, he would exterminate the "rats."

* A "rat" was defined by the witnesses, to be an individual who will underwork his brother journeymen. A "rat" office is an office which will employ "rats." Such an office is held to be "in bad odor."

The testimony relating to the typographical society, "rats," etc., was objected to by the counsel for plaintiff, but admitted by the court as going to prove the truth of the articles published in the papers subsequent to that of September 9.

An attempt was also made to prove that the plaintiff compelled his hands to take their wages in trade, which failed.

The plaintiff, by way of rebutting, showed that his dealings with his hands were always fair and honorable; and attempted to show that by the proceedings of the typographical society as connected with those of the defendant's paper, he had sustained damages.

King and George Pugh, for the Plaintiff.

Fessenden and Storer, for the Defendant.

COFFIN, J., charged the jury, in substance as follows:

Gentlemen of the Jury:—This is an action for printing and publishing an alleged libel of and concerning the plaintiff. The plaintiff alleges that the defendant is guilty: the defendant denies it.

The first question for your determination is, is the defendant guilty? If upon full examination, you say No, that will end all further inquiry. If you say Yes, then there will be a further question: How much damages shall the plaintiff receive?

To decide these questions, it is necessary to have a clear understanding of them.

A libel in reference to an individual, may be defined to be, a false and malicious publication against an individual, either in print, or writing, or by pictures, with intent to injure his reputation; to provoke him to wrath, expose him to public hatred, contempt or ridicule. Words of ridicule only, or of contempt, which merely tend to lessen a man in public esteem, or to wound his feelings, will support a suit for libel, because of their being embodied in a more permanent and enduring form than the mere uttering them by word of mouth, on account of the increased deliberation and malignity of their publication, and of their tendency to provoke breaches of the peace. 508

Much has been said as to the *publishing* of the alleged libel, and as to the defendant's being the *publisher* of the *People's Paper*. The two things should not be confounded. If the defendant was the publisher of the paper at the time the article complained of was printed in it, and circulated, there can be no doubt, under the circumstances detailed to you, if you believe them, of his being guilty of the publishing of the libel. If he was not the proprietor and publisher of the paper, it does not necessarily follow that he did not publish the libel. The proof of the issue is upon the plaintiff. He must show you by such testimony as the law says is sufficient to authorize you to believe that fact, before the defendant is put upon his defense. In cases of libel, as well as others, the proof may be direct and positive, or it may be (and it frequently so happens), that no direct proof can be given. Resort is then made to presumptive evidence, and in cases of this kind, the same reasonable inferences and presumptions are to be made by the jury, as in all other cases.

To publish a libel, is to make it known—to communicate it. If it be a picture, to exhibit it; if written, as for instance a letter, sending it to a third person, is a publication. The communication of the libel, whether written or printed, to a third person, is a publication. Publish-

OHIO DECISIONS.

Superior Court of Cincinnati.

newspaper, is a publication by the proprietor or publisher

satisfied that the defendant was the publisher of the
the time this production appeared in its columns,
he published it. Whether he was the publisher of the
fact you must determine from the evidence. He may
be publisher of the paper, and yet be liable as publisher
who are concerned in publishing a libel, or cause, or
any manner in the publication, are responsible. All
procure it to be made known—to communicate it, are

The proprietor of a newspaper, edited by another, is
publication of a libel in that paper, though the publication
his knowledge. The disclosure of the name of the
r, or of the author of a libel, will not justify or excuse
here may be cases where the surrender of the name of
is a circumstance in mitigation of damages, but it is no
re is no precedent of such a justification. As I have
no point is more fully established than this, that all
in a libel as the composer or procurer of it to be
and the publisher and the procurer of it to be published,
ple in law. This doctrine, which renders all equally
who are any ways concerned in the unlawful publica-
too well settled to be even doubted. Individual char-
acteristics, or social happiness and domestic peace are
not sufficient that the printer, by naming the author,
suffered an action against him. This remedy may afford
no relief to the injured party. The author may be
individual who may easily elude process, and if found, he
remunerate in damages. It would be no check on a
who can spread the calumny with ease and with rapidity
community. The calumny of the author would fall
ground, without the aid of the printer. The injury is
less, which, like other powerful engines, is mighty for
its good.

owns type, and lets that type to another to print a paper
any way, either by himself or others as his agents, con-
tains the type, or the paper printed on the type, is not
libel printed in that paper. But if he is in any way
publication of the paper, or procures, or aids, or assists
his journeymen or apprentices while in the course of
the printing and making public of that paper, he is

rent, for hire, a newspaper for another, knowing that
it is libelous, and the public carriers of the paper go to the
the printer and there receive from the printer or his
apprentices, while in the course of his business, the paper
delivered to subscribers, if the paper contains a libel, the
printer, in delivering, is responsible.

to a printing office with a handbill or other document
on a matter, and the printer print the same, either in
any form, and redeliver the printed matter to a third
person, the printer is responsible.

held that printing alone is publishing. I am not pre-
sented so far. It is true, our statute provides that if any

person shall write, *print or* publish, or cause or procure a libel to be written, *printed or* published, etc., he shall be liable, etc.; and *Holt*, in his work called *The Law of Libel*, says in so many words, "*Printing a libel is publishing it;*" yet it seems to me that these words are to be taken with some little qualification. A man may print a paper—may print a libel, show it to no one, keep it concealed, or destroy it; that, it seems to me, would not be publishing it. But printing and *permitting others to read it*—printing and *delivering it to a third person is publishing it*; and it is in this view, I think, that *Holt* says printing is publishing; for he immediately adds, "the printer gives a body and activity to the poison, which is mixed up in private, and would lie in a quiescent state, if no person could be found to put it into that form which is best suited to give it publicity." "Printers and booksellers," he adds, "therefore, have been justly deemed the instruments of crime."

There is a case reported in the *City Hall Recorder*, which shows how little publicity has been held to amount to publication of a libel, within the meaning of the law. In that case, the defendant wrote a libelous pamphlet against the plaintiff, and caused fifty copies of it to be printed, under the inspection of his son. Forty-five of these copies defendant retained in his own hands, and the other five he sent to his wife, after indorsing four of them with the names of four of her friends; the wife delivered two or three of them to the persons to whom they were addressed. The judge at the trial ruled that the delivery of the manuscript to the printer—the defendant's permission or directions to his son to examine the proof sheets by comparing them with the manuscript, were acts of publication—that the delivery, by the wife, of the pamphlets to the persons to whom they were directed by the defendant, amounted to a publication by the defendant, she acting in that matter as his agent. 508

The law is well settled, that if a printed libel is found to be public—to be in circulation—the proof of the printing by a person is evidence from which a jury may infer publication.

I have said that the burden of the proof of this issue was upon the plaintiff. I have also said that in the absence of direct proof, presumptive evidence must be resorted to, and that the same reasonable presumptions and inferences are to be made in this class of cases as in all others.

If, then, from the testimony, you believe that the paper containing this alleged libel was printed at the defendant's printing office, by the defendant, or by persons employed by him, while in his employ, or that he or they, while in his employ, aided and assisted, in whole or in part, in the printing at his office, the law authorizes you to infer that he published it. If you have the testimony and make this inference, the burden of proof is changed. It then becomes the duty of the defendant to *rebut* this inference. This he may do by showing to your satisfaction that he had nothing to do with the publication—that he did not procure it—that he did not in any manner aid or assist, by himself or the persons in his employ, while engaged in his business, in the publication.

The next question is, What proof is there of malice? To answer this question, we must know what is meant by malice, as here used.

If the libel be false, malice is inferred; *i. e.*, it is an implication of law, from the false and injurious nature of the charge.

The supreme court of this state, say in *Watson v. Trask* (6 O. 532), where the words are false, the law infers malice.

Malice, in law, does not necessarily mean ill will towards the plaintiff, in the ordinary sense of the word. In ordinary cases, *maliciously*, in law,

means intentionally; *i. e.*, if an illegal act, one prohibited by law, is done intentionally, wrongfully, it is, in law, maliciously.

When, therefore, there is no doubt as to the illegal quality of the words published, and no circumstances appear which in point of law entitle the writer to any privilege in making the statement, his malice is an inference in law, from the act of publication, and no other proof of malice is necessary.

It has not been claimed, upon the part of the defendant, that this publication was made under circumstances which in point of law entitled the party to any privilege in making it, and it is therefore not necessary for me to explain what are privileged communications rebutting this presumption of malice.

I have said all that I intend to say upon the issue made up by the pleadings. It is for you to answer that issue. Looking to all the facts of the case, although the plaintiff has been libelled, yet if you are not satisfied that the defendant was the publisher, as the law defines it, of that libel, he is entitled to your verdict. If you are satisfied that he is guilty as the publisher, then you must decide what amount of damages the plaintiff shall recover.

The question of damages is wholly placed with you. You are to determine the amount to which, under all the circumstances, the plaintiff is entitled.

The constitution of our state has provided that for an injury done to a man's reputation, he shall have redress by course of law, as well as for injuries to his property or person; and the law will secure, by its most powerful sanctions, the enjoyment of a good reputation to the man as it; and when that reputation is wantonly and unjustly assailed, by wholesome verdicts of jurors, the authors of the injury.

It is said by a writer upon this subject, that "the law speaks the language of reason and religion. It places under its protection and guards with the same sanctions, the good fame, as well as the life, liberty and property of every man. It considers reputation, not only as one of our pure and absolute rights, but as an outwork which defends, and renders them all valuable. The law forbids revenge. When it ties up the hands of some, it restrains the tongues and pens of others."

The maliciously, wrongfully, without just cause, uttering verbal slander against a citizen of good reputation, should always be punished. The publisher of a malicious libel in a newspaper, it seems to me, is more deeply responsible, and, in a proper case, should be punished with more severity, because the publication in that manner renders the charge more durable and widely known, and affects the public to a much greater extent.

The public, gentlemen, have an interest—a deep interest, in the public press, as well as in the preservation of the good character of every citizen.

It is to be regretted that the fact exists which was spoken of in the argument, that in too many instances the conductors of the public press are too careless of its purity, and sometimes in their zeal in the discussions of the matters of the day, forget the high and responsible position they occupy, and descend to personal conflict.

It seems to me that it is the peculiar province of a jury, in a proper case, under circumstances which would, in their opinion justify their prompt interference, to remedy this evil.

It has been remarked by a learned judge, that "a trust of the most interesting and important character subsists between the public and the conductors of the press. It is, that nothing but correct and useful and wholesome matters shall be circulated. In the present state of society, newspapers become almost elementary works of instruction; they are admitted into our families, to be read by our wives and children and passed from one member to another, with the same freedom as school books and literary and scientific works. They furnish aliment to the youthful thought and taste, and when badly conducted, they become the most mischievous poison. No one has his newspaper inspected, or cautions his family against the pernicious principles it may hold out for imitation, before allowing it to be read, but placing confidence in the moral sense and integrity of the publisher, it is permitted to be read without check or restraint."

We all boast of the liberty of the press. Indeed there is nothing upon which we are justly more sensible than upon whatever has the appearance of affecting that liberty. "The liberty of the press consists in the right to publish with impunity, *truth*, with good motives and justifiable ends." Our constitution has secured to us this liberty, in its largest sense; anything beyond it becomes licentiousness. "Every citizen has an indisputable right to print, upon any subject, as he thinks proper, *being liable for the abuse of that right*." There is nothing in the law as I have delivered it to you, restricting this liberty. The law prohibits nothing but injury. It confines within proper limits the employment of the press, an instrument as pernicious in its abuse, as it is beneficial when properly controlled.

It has been intimated in the argument, that sometimes cases are brought into court by a party, who, having no true estimate of the value of a good reputation, is willing to make attacks upon his character a matter of merchandize, and courts the slander, that he may profit by a verdict of a jury. In such a case, a jury would indignantly send him out of court, as empty in purse as he came in. The halls of justice are not to be polluted by the contests of such men, in that way. The public, who are outraged in the publication of such libels, should seek, in a public prosecution, the vindication of the law.

It sometimes happens, in the investigation of causes in court, that an action for slander or libel is found, upon examination of a jury, to be based upon a charge really trivial in its character—sometimes a charge made under some honest mistake, and immediately corrected—or from other causes, the jury find the mitigating circumstances great, amounting always to an acquittal of the defendant. In such a case, a jury would give but nominal damages.

The defense in this case claims, that should you find the defendant guilty, there are circumstances in proof which tend strongly to reduce damages.

You will look to the testimony; you will examine the proof of mitigating circumstances, and give the defendant all the benefit to which such circumstances entitle him. 811

There are other cases, gentlemen, where the charge is of a more serious nature, where a man of good reputation has been injured in his character—held up to ridicule and scorn—his feelings outraged—himself harassed by an unauthorized publication. In such a case, it is the duty of the jury to award to him full, adequate, complete compensation in damages. And where, from the testimony, the

110 DECISIONS.

Court of Common Pleas.

ce existed, that there was ill will, that and designed to injure the plaintiff, that shed by the publication to destroy the reputation of his influence in society, and his means of receiving such damages as they think necessary to make good the actual injury, to make him whole, but without punishment to the defendant.

ed from commenting on the testimony. d on both sides, and the counsel have fully said to you for your consideration. You will say in your retirement. Should you find and publish the libel set forth in the plaintiff's already instructed you, will end all further and render a verdict for him. Should you find that it can determine, from the testimony, to which is mentioned this properly belongs, and find it admitted to you.

and damages assessed at \$500.

E CORPORATIONS.

Common Pleas, Ohio.]

President Judge. In Chancery.

SANDUSKY STEAMBOAT COMPANY AND OTHERS.

Advised by E. B. SADLER !

ty, the complainant must have, or at least claim a legal right in the matter; and this must distinctly appear in the bill sustained.

adequate remedy at law.

s is formed, and a certain board of directors authorized. The whole board must be present at the settlement and bind the parties.

which the defendants demurred, stated that numerous steamboats on the lakes entered into a combination to run their boats together, and divide the value of the several boats, which parties to the association. The bill then alleged this combination, and the amount each boat should be managed by a board of persons whose names are mentioned. It was said that each boat should have an agent at Sandusky. That the steamboat Sandusky, Taylor & Pratt, Taylor & Co. were their agents to act. That a settlement was made by the defendants August 1, 1885, whereby it appeared that more than she was entitled to under the bill, therefore, was found to be indebted to the plaintiff of \$4,285, for which sum Pratt, Taylor & Pratt, four drafts on said Sandusky Steamboat

company, which drafts are made payable to said complainant as secretary of said association. That these drafts were intended for the benefit of certain other boats mentioned in said bill. That the Sandusky Steamboat company refused either to accept or pay the drafts, although that amount was justly due, and Pratt, Taylor & Co. authorized to draw for it. The drafts were returned to complainant as secretary, when the company refused to accept them; and soon after said association was dissolved. That in 1840, the Sandusky Steamboat company passed a resolution appropriating \$3,000 to abide the result of any suits commenced, or which might be commenced against Pratt, Taylor & Co., for any liabilities which they might have incurred in managing the company's business at Buffalo. That in October, 1841, complainant commenced a suit at law against said company on said drafts, for the benefit of John Wilber, who was then and is still the sole owner, having obtained them from the boats which were originally entitled to them, together with all their equities against said company. That said suit was tried at the July term of the supreme court in Erie county, 1843, and the court having charged the jury, that, as the parties to the association had agreed that settlements should be made by a certain board of directors, all the members of the board must be present, and that a majority could not alone act and bind the parties, the complainant thereupon asked to and became *nonsuit*. The complainant then alleges, as all of said directors were not present at said settlement, he has no remedy at law, and he comes into chancery for relief. That since said suit the steamboat Sandusky has been burned, and the company dissolved. The bill makes the stockholders parties, and asks to make them account for dividends, etc., which they have received. It alleges that the owners of the boats connected with said association, were so numerous the complainant could not make them parties, and asks to prosecute in his own name for all who have any interest in the matter. But the complainant then alleges that no one has now any interest in the amount due from the said Sandusky Steamboat company, but said John Wilber, who is made defendant to the bill. The bill concludes with a prayer for specific and general relief.

Parish & Sadler and *L. S. Beecher*, in support of the demurrer, claimed:

1. That the bill showed that the complainant had no interest in the subject matter of the suit. He is but a mere volunteer. Such a person cannot sustain a bill in equity. *Story's Equity Pleading*, 198, 200. This objection is good on demurrer. *Story's Eq. Pl.*, 76, 389.

2. That the fact of the pretended settlement being made by a part instead of all the directors, did not authorize the complainant to come into equity to enforce that which was null and void at law; merely because it was null and void. 561

3. That the complainant or any other person could not come into this court to enforce the collection of the drafts. The remedy on them is at law. But, if the drafts are null and void, because the pretended settlement is illegal, and therefore, no settlement, then—

4. The claim, if any ever existed, is barred by the statute of limitations, as six years expired before the filing of the bill. Courts of equity are governed by the statute of limitations the same as courts of law. 1 *Story's Eq.*, 73 and 502; *Wright's Rep.*, 526; *Story's Eq. Pl.*, 581; 7 *John. Chan. Rep.*, 118; 10 *O. Rep.*, 524.

This objection is good on demurrer, where, in the language of Judge Story, "it appears on the face of the bill that the cause of action (arising on a simple contract), accrued more than six years before the filing of the bill." Story's Eq. Pl., 378, section 484, ch. 10.

Reber & Camp and *S. F. Taylor* argued the case for complainant, but as their arguments were oral and I took no notice of their authorities or points at the time, I will not attempt to state even their substance, as I might do them injustice. They claimed, however, as Pease had the legal title to the drafts, he being the payee, it was proper for him to file the bill for the *cestui qui trust*. To which defendant's counsel replied, if it were the drafts the complainant sought to enforce, his remedy was clearly at law, but if they were void, and complainant sought to make defendants account for moneys received by them, then he certainly had no claim or interest in the matter.

BY THE COURT. On demurrer to a bill in chancery, all the facts stated in the bill, that are well pleaded, must be taken as true. Adopting this test of truth, it is impossible not to see that injustice is likely to be done, unless we can in some form decree relief between these parties. But how much soever we might be inclined to investigate the merits of this case, there is a defect in the very frame and constitution of the suit, from which, as it seems to us, there is no escape. This conviction has relieved us from the investigation of the various points debated at bar. We base our decision upon a single objection raised by the demurrer, as we see no way in which it can be avoided so as to present the others.

In order to enable a person to maintain a suit in equity, and before he can be subjected to a suit in equity, he must have, or at least claim to have, in the one case an interest, and in the other a title to and an interest in the subject matter. And this must distinctly appear. If it do not, the bill is fatally defective as to him, and must be dismissed on demurrer. If a person thus situated is made defendant even to a bill of discovery 562 only, he may demur, because he is a competent witness. Both parties are entitled to examine him as such, and they have no right to involve him as a party to their litigation. If such a person officiously comes into a court as a complainant, he will be turned out with costs. The duty of a court of equity is to try real cases. It does not undertake to try feigned issues, nor to investigate mere abstract questions. A party, who would therefore invoke its power in any case, must show that he has a title to relief and an interest in the thing with respect to which it is claimed.

The rule thus cited will at once be recognized as sound; it is just as palpable to us that its operation must be to defeat this suit.

"The bill is framed with a double aspect." The court then states the principal substance of the bill, which it is deemed unnecessary here to repeat. The court then says: "Upon these facts, one object of the bill is to enforce the collection of the drafts which the defendants are bound to pay as is claimed. We do not stop to consider the title to complainant as the drawee of these bills, and asking a decree upon them because the bill itself discloses that they are void. If they can be enforced against any one, it is not against these defendants. But if the drawing of these bills by the defendants' agents in Buffalo was a waiver of the objection, that they were not drawn pursuant to a settlement by a full board of directors, the fact is one properly appealing to a court of law; and, if considered as a fact in the case, it shows that there is a complete and adequate remedy at law, and thus sustains the demurrer on that ground. But it

would be wrong to consider the defendants' agents as having authority to waive the objection. If Pratt, Taylor & Co. were authorized to draw at all, the power ought to be construed, especially in suits between members of the association itself, to be a power to draw for balances found only in the manner provided for in the articles and constitution of the association.

It is obvious, therefore, that the only ground upon which the real party in interest can come into a court of equity, is that of account. If, at the period of settlement, August 1, 1835, there was a balance due from these defendants, and Wilber has in any way acquired a right to that balance, it would entitle him to have the partnership account taken and the balance ascertained and paid to him. It is alleged in the bill that he, and not the complainant, has acquired and now holds that right. It is also alleged that the complainant has no interest in and no right to the moneys in controversy. He is the mere naked bailee of the paper on which the drafts are drawn, having no claim to the proceeds when collected. He asserts no claim against Wilber. He does not allege that Wilber refuses to receive the drafts, or that he is in any way responsible if Wilber will not receive them. He professes to come into court as the guardian of Wilber's rights, as identical with him, and yet makes him a defendant, and in effect prays that a decree may be made in favor of one defendant against the other defendants. He might be properly told that it will be time enough for the court to act when Wilber thinks proper to make his complaint. Wilber is the only one who can complain. He is the one entitled to demand on account. His right to this is independent of and unconnected with the drafts, and may exist though the drafts are void. We conclude, therefore, that the defendant, Wilber, is the sole owner of the subject matter of the bill—that the complainant has no interest whatever therein, legal or equitable, and has therefore no title to sue. The bill is dismissed. 563

FORGERY.

570

[Court of Common Pleas, Hamilton County, Ohio, Criminal Term for July, 1845.]

THE STATE OF OHIO V. ROBERT NEALE.

[Reported by the EDITOR.]

Meaning of the terms, bills of credit—subjects of forgery under the Ohio statute—Kentucky scrip.

This was an indictment for counterfeiting and uttering. There were five counts: 1. For counterfeiting "a certain contract for the payment of property of the state of Kentucky." 2. For uttering, etc., "a certain contract for the payment of property other than money of the state of Kentucky." 3. For uttering, etc., "a certain writing obligatory of the state of Kentucky." 4. For uttering, etc., "a certain assurance of stock, to wit, of the bonds of the state of Kentucky." 5. For uttering, etc., "a certain promissory note for the payment of property other than money." In each of the counts the same instrument was set forth as follows:

"No. 3044. Internal Improvement. The state of Kentucky is indebted to the bearer six dollars, with interest from date, at the rate of 6

"A bond given for a prisoner's return to custody, after being unlawfully permitted to go at large, is void." *Fansher v. Hant*, 1 South., 319; 11 Mass., 16.

"A bond, executed by an officer when he has no authority, is void." 15 John., 256.

"The Hustings court, of Williamsburgh, Virginia, without any legal authority, appointed a collector of taxes, and took from him a bond, with securities for the due collection," etc. The bond was adjudged to be void. 1 Leigh, 485.

"If the sheriff take an obligation of a prisoner for his appearance in a case where he is not bailable by the statute, and let him go free, the bond is void." 1 Shep. Touch, 374.

"A bond taken by an officer, not required by law to take a bond, is void, and no action can be maintained on it." 2 Am Law Jour., 80; Am. C. Law, 389.

9 They contended, thirdly, that the bond is void, if not authorized by statute, as the courts have no common law criminal jurisdiction in Ohio; and even if the courts of Ohio had common law jurisdiction, they had no authority to bail after conviction and sentence, as all the cases of bail, after conviction, were exceptions to the common law, and not common law itself. In the case of the *State of Ohio v. Willis*, in this county, Judge WOOD allowed a writ of error, but refused to admit to bail. Mr. Bierce, of counsel for Willis, then applied to Judges LANE and BIRCHARD, sitting in Stark county, who also refused—Judge BIRCHARD remarking, that the same point had been made before the supreme court of the United States, and the power to bail, after conviction, denied.

Mr. Otis, prosecuting attorney, contended that the whole policy of our government and laws, was to secure the liberty of every subject, except his restraint was imposed as punishment, and not to secure his appearance; and cited the 12th section of the 8th article of the constitution, which declares, that all persons shall be bailable, by sufficient securities, unless for capital offenses, when the proof is evident, or the presumption great. Swan's Stat., 38.

The 8th section of the *habeas corpus* act declares that accessories before the fact, to capital felonies, shall not be bailed. Swan's Stat., 435.

In all other cases, relative to bail in criminal cases, the usages and principles of the common law will prevail, unless the statutes of this state shall control or modify such usages and principles. Our courts have always adhered to them, unless they were opposed to our circumstances, state of society, or form of government.

That the supreme court, or any one or more of the judges thereof, having a control over all inferior courts, have the same powers, in relation to bail in criminal cases, as the King's Bench in England have, unless their authority is sustained by the constitution, or some statutory enactment.

In the case of *Tayloe*, 5 Cow., 39, it was held, that the supreme court of New York had the same powers in relation to bail as the King's Bench, and might let persons, charged with criminal offenses to bail in all cases whatsoever."

The King's Bench may take bail before and after conviction, in cases of felony, or after process of outlawry, which is the same as conviction. 2 Hawk. P. C., 113. So may the justices of gaol delivery, after convic-

tion, in certain cases of felony; 2 Hale P. C., 106; 1 Bac. Ab., 489; *State v. Ward*, 2 Hawk. Rep., 443; 3 Hill, 674.

The question whether bail shall be taken or not, is, in all cases of felony, purely judicial. The statutes, in giving power to bail, create no ministerial duty, and impose no obligation beyond what rests upon any judge in the exercise of his powers as such. It is a matter resting in the sound discretion of the court; and whenever the court have exercised this discretion, it cannot be called in question by any other court. 3 Hill, 673; 10 Wend., 464. 10

The law upon which the writ of error was allowed in this case, is contained in Swan's Statute, 731. The 3d section provides, that in all cases of conviction, where the punishment shall be capital, or imprisonment in the penitentiary, the court, judge, or judges, allowing the writ of error, may order the same returnable forthwith, or before the court in bank, and shall also order a suspension of the execution of the sentence.

The next section provides, that in cases not provided for in the previous sections, execution of the sentence shall not be suspended, unless the defendant enter into a recognizance.

The constitution, and authorities cited, take from the court the power to receive bail under the third section, in cases punished capitally, but not so as to cases punished by imprisonment in the penitentiary.

While the execution of the sentence is suspended, for the purpose of determining the question raised on the writ of error, the security, and not the punishment of the criminal, is the object of the law. He may therefore be let to bail, if his final appearance is thereby secured, and such an act does not contravene either the letter, spirit, or policy of this law. The order in this case, admitting to bail, was the act of a judge, having power over the subject matter, and whether he exercised his power discreetly or not, cannot be inquired into by this court.

The case of *Morris v. Marcy*, 4 O. Rep., 83, is almost, if not altogether directly in point, so far as it regards the powers and principles involved. See also Wend., 464.

The cases cited by defendant's counsel, lie without the true question involved in this case; but I can easily show the grounds why the bonds referred to by them were void.

The first case is a bond given for ease and favor, which is void by the common law—which is founded on an English statute in force before the settlement of this country. 5 Mass., 314. So also the second case.

The third case is where the writ was so far *functus officio*, that the second arrest upon the same writ was illegal, and the bond taken, by color of office, void.

The fourth is where the appointment was invalid, as being made by those who had no authority in the premises. 11

The fifth is when the bond is made void by the statute. 23 Hen. 6, c. 10, § 5.

In relation to the sixth case, no facts are stated, and no reasons given.

Without specifying the points decided, the following authorities support the following position, namely, that in suits upon bonds, the plaintiff is entitled to recover where there has been no performance, and no excuse for nonperformance, unless the bond is contrary to the general rule and policy of the law, *malum in se*, or unlawful by statute. Hurlstone on Bonds, 13 and 56; 1 Black., 358; 10 O. Rep., 51; 1 O. Rep., 271; 5 Mass., 314; 7 Mass., 98; 2 Am. C. L., 388, § 7.

In the case of *Ohio v. Kendall*, in Cuyahoga county, Kendall was convicted and sentenced to the penitentiary. A writ of error was allowed by Judge LANE, returnable to the supreme court in that county, and Kendall let to bail as in this case. This case shows the concurring opinions of Judges LANE and WOOD, of our supreme court, upon the question before the court.

BY THE COURT. The question before us is not only a difficult, but a delicate one. The construction of our courts is such, that the supreme court is frequently called on to pass upon our proceedings, and in cases of this kind we are called upon to pass upon the legality of the acts of the members of that court. The issue made by the demurrer in this case, compels us to do so; and, however delicate the task, it is one from which we cannot shrink.

The idea that first suggests itself, in this investigation, is, by what statute, or known proceeding was this bond taken? for it is against all our received notions of the law and the policy of punishment, that a culprit, or penitentiary convict, should go at large while he is serving his time in the penitentiary, if the judgment of the common pleas is affirmed—as it was in this case.

To solve this question, we must inquire “where did the supreme court first acquire *any* power in *criminal* cases?” The fourth section of the third article of the constitution of this state, says, “the judges of the supreme court, and of the courts of common pleas, shall have complete *criminal* jurisdiction in such cases and in such manner as may be pointed out by law”—evidently meaning statute, and not common law.

The supreme court of this state, then, have no *criminal* jurisdiction, except such as is pointed out by statute. They have no common law jurisdiction; and we have only to look at the statute to ascertain their whole power. If the statute confers upon them the power to take this bond, it is valid; if not, it is void.

What power, then, does the statute give to the judges of the supreme court? It confers upon them the same power as have the judges of the court of common pleas, in allowing writs of *habeas corpus*, and in trials for murder. In no other case had the judges of the supreme court any criminal jurisdiction, until the statute of March 7, 1831, allowing writs of error in criminal cases. This act conferred upon the supreme court additional powers. If they possessed common law powers, this statute was superfluous; for the power conferred by this statute, of allowing writs of error, would have been inherent in them by the common law.

This statute gives the supreme court, or any judge thereof, power on good cause shown, to allow writs of error. The third section provides, that “in all cases of conviction, where the punishment shall be capital, or by imprisonment in the penitentiary, the court, judge, or judges, allowing such writ of error, may order the same to be made returnable forthwith before said supreme court, wherever they may be sitting; or before said supreme court at their next session in bank, and shall also order a suspension of the execution of the sentence.”

So far, then, as this statute relates to conviction when the punishment is capital, or by imprisonment in the penitentiary, it confers no power on the supreme court, or any judge thereof, to admit to bail.

The fourth section provides, that, “in *all other* cases, not provided for by the second or third sections of this act, the court or judge, allowing such writ of error, may order a suspension of the execution of the sentence upon the defendant, upon his or her entering into a recogni-

zance, before the clerk of the court of common pleas where such cause was tried, with at least two good and sufficient sureties, to be approved by said clerk, in such sum as shall be specified in the order of the court, or judge, allowing such writ of error."

What authority have the legislature given the supreme court by this statute? To allow writs of error, and suspend the execution of the sentence in all cases, and on conviction for offenses, the punishment of which is less than capital, or confinement in the penitentiary, they may order a suspension of the sentence, upon the defendant's "entering into a recognizance, *before the clerk of the court of common pleas where such cause was tried.*" Granting this power to the judges in cases where 13 the punishment is not capital nor imprisonment in the penitentiary, clearly implies that it is not granted in other cases.

Have the supreme court, then, or any judge thereof, any power to take bail *after conviction*, in cases other than those specified in the statute? It is contended by the plaintiff's counsel that this power is implied. We think not. The constitution takes from them all power in criminal cases, except what is "pointed out" by statute. Nothing is left to be taken by implication.

But this bond is clearly bad in another respect. The statute allowing writs of error, provides, that the recognizance taken in cases where the punishment is less than capital, or confinement in the penitentiary, "shall be entered into before *the clerk of the court of common pleas where said cause was tried.*" The order of the judge allowing the writ in this case, was that the defendant should enter into a recognizance *before the clerk of the supreme court*; and this bond was taken by him, which is an act nowhere authorized by the statute in criminal cases.

The judge, ordering the bond to be taken by the clerk of the *supreme court*, shows that he supposed, from their general powers they had a general discretion to bail in *all* cases. If they have that general discretion, it is a *judicial* act and this court have no right to review it. But have they the power, is the question—not whether they have improperly exercised it.

I have endeavored to show, that the law authorizing the supreme court to allow writs of error, gives no such power, but *negatives* the idea that they possess it. How do the courts in England, and in those states that claim to have that transcendent power, operate on the subject? It is by the *habeas corpus act*; and, if any doubt could remain with regard to this bond, it is removed by a reference to that act. The first section of that act provides, that "if any person, *except persons convicted of some crime* or offense, for which they stand committed, or persons committed for treason or felony, the punishment whereof is capital, plainly and specially expressed in the warrant of commitment, shall be confined in jail," and shall make application to any one of the judges of the supreme court or president, or associate judges of the courts of common pleas, he shall issue a writ of *habeas corpus*.

If persons, *after conviction*, are bailable, why is the power to issue a writ of *habeas corpus*, for the purpose of bailing them, excepted in this statute? To grant to them the power to bail persons convicted of crime, and withhold from them the power to issue a *habeas corpus*, 14 to bring such convict before them to be bailed, involves an absurdity, of which we cannot believe the legislature guilty.

If any doubt were still to remain, we might reason from principles of policy against this general power of unlimited discretion being given

to any judicial tribunal; and hence we believe it to be excluded by our laws.

To warrant bail, it is said "the guilt or innocence of the prisoner must be indifferent," or hang in equal scales. Who holds the scales? If held by the law, the scales will ever be even; if by the judge, different opinions may prevail at different times upon the same circumstances, and the scales of justice vary as often as there is a change of judges.

But we are referred to the celebrated case of *ex parte Tayloe*, 5 Cow., 89, where it is said, "the supreme court have the same powers in relation to bail as the English King's Bench, and may let persons *charged* with criminal offenses to bail *in all cases whatsoever*."

The King's Bench in England, and the supreme court of New York, have *common law jurisdiction* in criminal cases; and if our supreme court possessed that power, we should feel bound by the decision. But, although with those transcendent powers, they have the *right* to let to bail in all cases, it is never exercised except under extenuating circumstances, to save life; and to obviate the necessity of a resort to the exercise of this power in this state for that purpose, the executive is vested with pardoning powers. Indeed, it is laid down in this very case, in which the power to bail *in all cases whatsoever* is claimed, that, "*if there is no reasonable doubt of the guilt of a prisoner, charged with committing a felony, he ought not to be bailed even by the snpreme court*." In New York, then, even with the power of the King's Bench and common law jurisdiction, the power to bail is never exercised in cases of felony when there is "no reasonable doubt of the guilt of the prisoner," and of course not after conviction and sentence.

In the case relied upon by the plaintiff's counsel, 4 O. Rep., 85, the court expressly recognize the doctrine laid down in 2 Coke Inst., 186, that "the accused might be bailed *until convicted* of the offense." We cannot, therefore, see that the decision can aid the plaintiff. As soon as we admit that our whole criminal jurisdiction is limited to the statute, we concede away the power to take this bond. We have no such power given by statute; and having no common law criminal jurisdiction, we must hold that this bond was taken without authority, and is therefore void.

The demurrer is sustained.

65.

FUGITIVES FROM LABOR.

[Circuit Court of United States, District of Indiana, May Term, 1845.]

VAUGHAN v. WILLIAMS.

[Reported by JUDGE MCLEAN.]

The provision in the constitution of the United States, and in the act of the congress of 1793, in regard to the surrender of a fugitive from labor, is binding on the state of Indiana and its citizens, the same as on other states.

A repugnancy between the compact in the ordinance of 1787, and the constitution, necessarily repeals the ordinance.

Indiana, by coming into the union under the constitution, consents to this; and the other party to the compact consents by receiving the state into the union. This is the common consent required by the ordinance to annul it in part or wholly.

Full effect must be given to the constitution and law of congress.

The laws of Missouri sanctioning slavery, must be respected, and rights under them enforced.

Courts are not to discuss slavery in the abstract, or the policy of slave laws.

An individual is liable to the penalty for a rescue, if he be present and encourage it. It is not necessary that he should put forth his hand to do the act.

An owner of slaves, who takes them to the state of Illinois, and keeps them at labor six months, and then removes them to Missouri, forfeits his right to them as slaves.

The case was argued by *Messrs. O. H. Smith and Wick*, for the plaintiff, and by *Messrs. Quarles, Bradley and Stevens* for the defendant.

OPINION OF THE COURT, BY McLEAN, J.

66

The plaintiff, a citizen of Missouri, brought his action against the defendant for rescuing from his possession certain slaves of the plaintiff, and fugitives from his service, whom he found and arrested in the state of Indiana. The defendant demurred to the declaration.

As the principal ground of the demurrer, it was insisted that the fourth article of the constitution of the United States, in regard to the delivery of fugitives from labor, and the act of congress on the same subject, do not apply where the claim is made by a citizen of a new state, not within the territorial limits of the union at the time the constitution was adopted, and that a citizen of Indiana is not bound by such provisions; that the sixth article of the ordinance of 1787, which remains in full force in Indiana, requires a fugitive from labor to be delivered up only when "claimed in any one of the original states;" and that, as the alleged slaves escaped from the state of Missouri, where the plaintiff still resides, neither the act of congress nor the constitution can apply to the case.

This question I believe, for the first time is brought directly before the circuit court of the United States. It is admitted that the common law imposes no obligation on a sovereignty or its citizens, to surrender a fugitive slave, who escapes from the jurisdiction where he is held in slavery. The rights of the master cease, on common law principles, when the slave, by whatever means, shall escape beyond the operation of the local laws. And this is also the principle of national law; unless under a treaty, or by reciprocal legislation, a slave is free, and cannot be recaptured when he enters a country where slavery is not sanctioned. And this would have been the case among the states of this union had not the constitution and act of congress provided otherwise.

But it is supposed that the sixth article of the compact of the ordinance above referred to, places Indiana and also Missouri on a different footing in this respect from the old states. It is true that this compact, or any part of it, cannot be annulled without the common consent of the parties bound by it. And it is assumed that the people of Indiana, never having assented to any change in the compact, are not bound to surrender a fugitive slave except when claimed in one of the original states.

When the people of Indiana came into the union as a state, they were as much bound by the constitution of the United States as the people of any other state. And any and every part of the ordinance which conflicts with the constitution of the union, so far as the state of

10 DECISIONS.

Court of United States.

sequently annulled. The common consent part of the ordinance, is found in the form and consent to come into the union by the acceptance of the constitution and recognition it be admitted that while Indiana remained so, there was no obligation to deliver up a person claimed by a citizen of "one of the states" it follows that her obligation as a state is the constitution acts upon a state and not on a person where the federal constitution imposes a duty on a state, it acts equally upon all the states. The articles of compact in the ordinance are void and is unsustainable. The constitution is the same in Missouri, the same as it is the foundation of Virginia. This no one can doubt, who is under a higher obligation than the constitution. Where any repugnancy exists between these laws must yield by the consent expressed by the people of the other states in congress

and the question of slavery has been discussed, and the constitution, requiring fugitives from justice, with this subject in the abstract, this court decided that slavery had its origin in usurpation and in violation of the natural rights of man, on of Independence; but these are topics for discussion. We look to the law, and only to

now be entertained as to the policy of introducing into the constitution, at the time of its introduction, a matter of the highest import. The fruits of the balance, whilst this and kindred subjects are in question; and they were settled only by a spirit of concession. But if in this and other respects perfect than the parties on either side are less bound by its provisions. If an alteration is desirable, let it be made, or attempted to be made. But, while it remains the fundamental law, no citizen will disregard its provisions. It was formed, perhaps, in every respect, by a consideration of the best that could be formed under the circumstances. It has saved us from anarchy and preserved a national character, and a proud standing in the world. Under its protection our commerce has flourished, and been extended to all the several states, and been extended to the benefit of the prosperity and glory of our country. There may be in the instrument, no one can deny, results which exceed the power of human

to be ruled; and the plea of the general issue being rejected to the jury.

CHARGE.

Gentlemen of the Jury: From the evidence it appears, that the plaintiff purchased Sam, Moriah, and their child, from one Hedrich, in Missouri, the 27th April, 1836, for the sum of eleven hundred dollars—five hundred dollars being paid down. He took the slaves into possession, and they remained with him until April, 1837, when they absconded. These persons formerly belonged to Tipton, a citizen of Kentucky, who, with the slaves, in October, 1835, removed to Illinois. He settled on military land, built a house, cleared ground, and made other improvements, declaring to different persons his intention to become a citizen of the state. Sam and Moriah were both employed in laboring in the fields and in the house until April, 1836, when they were removed by Tipton to Missouri. Before this was done, there was much conversation in the neighborhood as to the right of the colored persons to their freedom. Tipton started with them before daylight in the morning, being under some apprehension that they might, if discovered, be rescued. He sold them in Missouri to the person of whom the plaintiff purchased. Tipton continued to reside in Illinois two years, and, on several occasions, exercised the right of suffrage.

In the spring of 1844, the plaintiff heard that the slaves were residing in Indiana, Hamilton county. Taking certain persons along with him, to prove his purchase of the servants, and to identify them, he went to Indiana. Under the statute of that state, he procured a warrant to arrest the fugitives, and a constable to execute the process, and some two or three other individuals to render any assistance that might be necessary. They proceeded to the cabin occupied by the colored persons, in the morning, before daylight. Admission was refused them. They pried the door from its hinges, and threw down the chimney, when the inmates surrendered, acknowledging the plaintiff to be their master. Time was given to send for a neighbor, who, Sam alleged, was indebted to him fifty dollars. That neighbor arrived, and in a short time others, who expressed a strong interest in behalf of the slaves, and that they should not be taken from the neighborhood. The plaintiff alleged that he had no desire to take the fugitives by force; that they should have a fair trial, and if held to be free, he should be content. He agreed to pay Sam for his improvements and other property. Some difference of opinion was expressed as to the justice before whom the fugitives should be taken; but the plaintiff finally decided that he would take them to Noblesville, a village some miles distant. They set out for that place, the company continually increasing until they arrived at Mr. Anthony's farm, where they stopped for breakfast. The plaintiff was averse to this, but yielded of necessity. After some two or three hour's delay, the company being greatly increased, set out again for Noblesville. A wagon from Mr. Anthony was procured, to convey the fugitives. They moved on at a very slow pace for a few miles, until they arrived at the forks of the road, one road leading to Noblesville and the other to Westfield. Here the company increased to about one hundred and fifty. There was great division of opinion which route should be taken. Mr. Bales addressed the assemblage, urging a submission to law, and saying, if the decision shall be against us, under our statute, we have a right to an appeal. This pacified a majority; and there seemed to be a general acquiescence in the advice given. But there were some who refused to acquiesce, and among them was the individual

who drove the wagon. . Receiving some encouragement from persons in the crowd, he drove his horses on the Westfield road. The plaintiff and one or two others attempted to stop the wagon, but they were unable to do so. A shout was raised, and the wagon was driven rapidly. The fugitives escaped, and have not since been seen by the plaintiff. Owen Williams, the defendant, was in the company at the cabin, at Anthony's, and at the cross-roads. He took an active agency in the proceedings in behalf of the slaves, but was not seen near the wagon at the time it was driven off, nor was he heard to encourage the driver.

These are the facts, substantially, as proved in the case. The subject is one of great delicacy and importance. Rights are involved, sanctioned by the laws of Missouri, which we are bound to respect ; and these rights are asserted under the constitution of the United States and the law of congress.

The second section of the fourth article of the constitution provides, that "no person held to service or labor in one state, under the laws
70 thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on the claim of the party to whom such labor may be due."

The act of the 12th of February, 1793, after pointing out the steps necessary to enforce the claimant's right, in the fourth section provides, that "any person who shall knowingly and wilfully obstruct or hinder such claimant, his agent or attorney, in so seizing or arresting such fugitive from labor, or shall rescue such fugitive from such claimant, etc., when so arrested, etc., shall forfeit and pay the sum of five hundred dollars, for the benefit of such claimant, etc. To recover this penalty, this action has been brought.

The plaintiff has proved that he purchased and paid for the slaves in question in the state of Missouri; and in justice to him it is proper to remark, that, in the prosecution of his claim in this state, he has taken 'no step which the law did not sanction. He proceeded under the law of Indiana, which, from the decisions of the supreme court of the United States, he was not bound to do. He has shown great moderation and kindness towards the persons claimed as his slaves, in agreeing to pay them for their property, and in other respects; and at no time did he evince any other disposition than to have his claim examined by a legal tribunal; that he acted throughout in good faith, believing that his right was sustainable, there can be no doubt.

It seems that the defendant, Owen Williams, from shortly after the arrest, up to the time of the escape of the colored persons, took an active agency in the movements of the company. He did not drive the wagon in which the fugitives were conveyed, nor is there any evidence that by word or action he contributed to the rescue at the time it took place. But, if he countenanced and encouraged from time to time the movements of the crowd which resulted in the rescue, or, being present, sanctioned it in any form, he is liable to the above penalty. A man cannot incite others to the commission of an illegal act, and escape the consequences by the plea that he did not put forth his hand in the consummation of the act. Every one of the one hundred and fifty persons who were present at the forks of the road, and who encouraged the rescue, is responsible to the plaintiff. The combination was unlawful, as its object was to defeat a legal investigation of an asserted right. There is no security for life or property, except in a faithful administration of the laws. That citizens,

whether opposed to slavery or not, in principle, should feel and express a solicitude in a case like the one under consideration, that there should be a full and fair investigation, is natural and commendable. 71 But the course of the law must not be obstructed. No citizen or number of citizens can interpose physical force, and defeat legal rights, without incurring a high offence against society. The advice of Mr. Bales was honorable to him; and his example in giving it is entitled to commendation.

But there is another point in the case which is clear of all difficulty, if you believe the evidence, and which may supersede the examination of any other part of the cause; and that is,—were not the colored persons entitled to their liberty? Having been brought to the state of Illinois, which prohibits slavery, by their master from the state of Kentucky, and kept at labor six months, under the declaration of the master that he intended to become a citizen of that state; and having actually exercised the rights of a citizen by voting, there can be no doubt that the slaves were thereby entitled to their freedom. This conforms to decisions repeatedly made by the supreme court of the state of Missouri. Such rulings are of very highest authority in a case like the present; and it is believed that there is no decision to the contrary. The question has been decided by the highest court of the state where the right of the claimant, to be effective, must be sanctioned; and that decision is against him. It is clear that the plaintiff had no knowledge whatever of the removal and employment of these slaves in Illinois by their former master. The price he paid for them, and every act in the case show, that he was wholly ignorant of this. A gross fraud was practiced on him by the person of whom he purchased the slaves, and against him or Tipton he may have recourse.

A question is made whether the title of the plaintiff is not good, if the colored persons voluntarily returned into slavery. This question does not arise in the case, as there is no evidence that they went voluntarily to Missouri. But, on the contrary, from the manner in which they were removed from Illinois, there can be no doubt that they were forcibly abducted by Tipton; and it appears that they sought the earliest opportunity to escape from their new master. As the claim to the services of these persons is not sustained, if you believe the evidence, which is not contradicted, you will find for the defendant, however improper his conduct may have been. If the fugitives were free, he is not subject to the penalty claimed of him.

The jury in a few minutes returned a verdict for the defendant.

EJECTMENT.

81

[Superior Court of Cincinnati, October Term, 1845.]

LESSEE OF BOWIE ET AL. V. ROE.

[Reported by the EDITORS from notes of the JUDGE.]

Held, that after the appearance term, and before judgment by default against the casual ejector, the tenants, upon showing merits, may be made defendants in place of the casual ejector.

It seems that courts are liberal in setting aside defaults in ejectment.

Two cases in ejectment. The facts are fully stated in the opinion of the court.

COFFIN, Judge. In these cases the declarations having been duly served on the tenants, with proper notices attached, ten days before the last term, were filed, and the causes docketed at that term, according to the provisions of the statute, and the rules of the court.

The plaintiffs now move for judgment by default against the casual ejector.

The tenants appear, and move to be made defendants in place of the casual ejector. They also move for a rule upon plaintiffs, for security for costs, the lessors of plaintiffs residing out of the state; and that the proceedings may be stayed until security be given.

It is admitted that the lessors of plaintiffs are non-residents of the state.

It is claimed upon the part of the plaintiffs, that because the tenants did not apply at the last term to be made defendants, and enter into the consent rule within that term, the plaintiffs, by the 55th section of the practice act (Swan, 664), are entitled to judgment, by default, as of course, against the casual ejector, and that the tenant's application to be made defendants, etc., comes now too late.

By the 48th rule of this court, the plaintiffs were entitled to judgment, by default, against the casual ejector, at any time after the second day of the June term; that judgment, however, by the same rule, would have been set aside at any time during that term, as a matter of course, but not after, upon the tenants making application for that purpose, with leave to be made defendants, and entering into the consent rule.

The plaintiffs did not move for judgment, nor the tenants to be made defendants at that term.

Are the tenants precluded from making that motion now? Are they so much in default, that they cannot now be admitted to defend these suits? Does it necessarily follow that judgments must be entered for the plaintiffs, the tenants be turned out of possession, and compelled to resort to another action to try the merits of the question involved in these cases? I think not. Suppose the plaintiffs to have obtained judgment by default against the casual ejector at the present term, and the tenants, instead of making the present motion, were seeking to set aside the judgments, and for leave to defend, what would be the result of that motion? It seems to me that upon a proper showing, the court would not hesitate to set aside the judgments by default, and permit the party in interest to defend his possession. It is said in *Adams on Ejectment*, 225, that the courts are liberal in their rules for setting aside judgments against the casual ejector, although regularly signed, and

Court.

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and *Gwynne*, for Plaintiffs.
d *Corwine*, for the tenants.

W.

October Term, 1845.]

chcock.

v.

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rem. against boats.

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Berry for stay of execution
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TION.

October Term, 1845.]

chcock.

v. ARCHER.

non arbitration bond, made
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etc., to arbitration. The declaration alleges the holding of the arbitration and award made to said intestate, and its non-payment by defendant.

The defendant pleads specially, that before the making of the bond, a warrant in bastardy was issued, under the statute against him, on the complaint of the intestate charging him with being the father of a bastard child with which she was pregnant, by virtue of which he was arrested and brought before the justice issuing the same, and that then the bond was executed, referring that complaint, and nothing else, to arbitration; and that such complaint, and nothing else, was awarded upon. To this plea the plaintiff demurs generally, in which defendant joins—thus presenting the question, whether at this stage of proceeding, under the Bastardy Act, the parties may settle the complaint in any other manner than that pointed out in the first section of that act. *Vide* O. Rev. St., page 156.

L. Case, for Plaintiff, and *H. H. Hunter*, for Defendant.

Per Curiam. Demurrer sustained, and judgment for plaintiff.

ARREST FOR DEBT.

131

[Superior Court of Cincinnati, October Term, 1845.]

BROOKE v. THORPE.

[Reported by the EDITORS.]

Motion to discharge on common bail, when too late.

Defendant was arrested on a *capias ad respondendum*, issued under the provisions of the act to abolish imprisonment for debt. On the day of arrest he filed special bail.

Mr. Farran now moved to discharge the defendant on common bail, because of irregularity in the affidavit.

COFFIN, J. The motion comes too late. After putting in bail above, it is too late to move to be discharged upon common bail for irregularity in the affidavit. 6 Taunt., 185; 6 B. & C., 76; 1 M. & S., 230; 1 Cowen, 290; 5 Cowen, 15; Harding, 203; 1 Swan's Practice, 160.

There is nothing in our late statutes changing this general rule.

Motion denied.

ATTACHMENT.

[Superior Court of Cincinnati, October Term, 1845.]

WINCHESTER, IRWIN & CO. v. PIERSON & AVERY.

[Reported by the EDITORS.]

Motion to quash the writ and set aside the attachment; 1st, because the affidavit does not show that it was made by the creditors, or their agent or attorney; 2d, because the affidavit does not show that the note sued upon was due at the issuing of the writ, or that defendants were then "debtors" of the plaintiffs, or that any cause of action had accrued; 3d, because the property attached was the individual prop-

132

DECISIONS.

City of Cincinnati.

whilst the writ issued against their

nts as "*partners*," and commanded the
ie lands, tenements, goods, etc., of the
d was issued on the 27th September,

e above named Winchester, Irwin &
says, that the above named Samuel D.
ners under the firm of L. S. Avery &
a note in the sum of five hundred
e said Samuel D. Pierson and Leon-
n residents of the state of Ohio, as he

ad attached certain property "taken as
"

s & Rankin, *contra*.

COURT BY COFFIN, J.

ctions, I think they are not well taken.
creditor or his agent, or by his attorney.
he affiant should in the affidavit affirm
vit filed, is in this particular according
Practice, and has been long in use.

idavit is direct and positive. I am not
of the words, "on a note," weakens the
in affidavit in this form, filed under
debt, would be defective or not, in
necessary to decide. In proceedings un-
ired to protect the liberty of the citi-
ily be that way where one citizen is to
: *parte* act of another.

ie 13th section of the act allowing
provides, that in case of partners, etc.,
separate estates, or against the joint
issued against both or any of them.
this section authorized the plaintiff to
of the joint debtors. Such is not its
es with the proper parties, nor the
the established usages of law. The
"manner his cause of action." (Ninth
to join a living partner in the writ and
if pleaded in abatement, as in any
Leveford, 4 O. Rep., 133.

e mode of proceeding *in rem*. in case of
his is a proceeding unknown to the
ursued strictly. 2 O. Rep., 229; S. C.
medy being nearly *ex parte*, and not
nmon law, ought not to be extended
Taylor v. M'Donald, 4 O. Rep., 155;
566.

ae the statute strictly, confining him
rate estate of a joint debtor by a writ

issued against the joint estate only? I think not. By so issuing he confines the attachment to the joint estate. 2 West. L. J., 296. If he desires to reach the separate estate, the writ should issue against the separate estate. The writ may issue to attach the property of the defendants, or that of any of them, or property of both descriptions.

In proceedings under this statute, before jurisdiction attaches to proceed in the cause, it must appear that the defendants are the debtors of the plaintiff, that the defendants have absconded, or are non-residents, and that the property against which the writ issued must be attached. 7 O. R., 259, pt. 1. The writ in this case, issued against the joint property of the defendants as partners. No such property has been attached. The writ was properly issued; but the officer has failed to find the property against which it issued; and it stands like any other case where process has been issued and not served.

MARRIAGE AND DOWER.

134

[Court of Common Pleas of Logan County, Ohio, October Term, 1845.]

THE STATE OF OHIO V. PETER MOORE.

[Reported by WILLIAM LAWRENCE, for the Logan Gazette, and republished from that paper at his request.]

The marriage of a person having a former husband or wife living, is *void ab initio*, and not merely *voidable*, by the common law.

The divorce act of Ohio has not abolished this doctrine of the common law.

Evidence of two marriages, the former of which is *void*, will not sustain an indictment for bigamy, but it is otherwise if the previous marriage is only *voidable*. The doctrine of *Jacobs' case*, (1 Moody, C. C. 140, and 1 Hale, P. C., 693, is affirmed.

This cause was submitted to the jury upon an agreed statement of facts, which were as follows:

That Peter Moore, the defendant, on the 24th of August, A. D., 1796, at Rockingham county, Virginia, was duly joined in marriage to Sally Sheltman, with whom he continued to reside until the year, 1834, or 1835. That about this time he left his said wife, removed to Logan county, Ohio, and on the 16th of July, 1837, he was duly joined in marriage to Mary Richards in said county, his former wife yet being alive, and in the meantime having removed to Hardin county, Ohio, where her residence was notorious. About the year 1840 his first wife died, and some two years after, he abandoned his second wife, and on the 11th of November, A. D. 1844, he was duly joined in marriage to Priscilla Henry, in Logan county, his second wife still living in said county.

At the August term, 1845, of said court, the defendant was indicted for unlawfully marrying Priscilla Henry, having another wife, Mary Richards, then living. The defendant being arraigned, pleaded "not guilty," and the cause was continued to the October term, 1845; and was tried upon the agreed state of facts, above.

R. S. Canby, prosecuted the case for the state, Mr. Lawrence, the prosecuting attorney elect, having been employed for the defense before his election.

William Lawrence, for the defendant, submitted the following points:

135 The defense is, that at the time defendant married Priscilla Henry, he had not a *wife* living as charged; that Mary Richards never became his wife, because at the time he married her, he had *another wife living*, his *true wife*, and the marriage to Mary Richards was, therefore, void.

1. The crime of bigamy is defined by statute 230, "if any married person, having a husband or wife living, shall marry," etc. Defendant is not guilty unless Mary Richards was his wife.

2. Marriage is a civil contract, and there are certain requisites essential to its validity, fixed by statute and by the common law.

1. The marriage to Mary Richards was *void* by statute 582, which provides that "persons not having husband or wife living may be joined in marriage." A contract in violation of law is *void*.

2. The statute regards certain marriages void *ab initio*, by providing p. 288, that "the issue also of marriages deemed null in law, shall nevertheless be legitimate."

The marriage, therefore, of Mary Richards was void by our statute.

3. It was equally void by our common law.

By common law, a party must be *able* to contract, or the marriage is void. No person can marry, having a wife living; such marriage is *void*. (2 Kent 79, and auth. cited.)

The marriage was so far void that no length of absence could legalize it, and it would always be an illegal connection though absence for five years unheard of, would be an answer to an indictment for bigamy. (2 Kent, 80; 4 John's Rep., 52; 1 Bl. 436-7.)

4. The marriage being void by statute and by common law, Mary Richards never was defendant's wife. Authorities in point: 1 Arch. Crim. Pl., 358-9; Stark. Ev., 893; Roscoe Cr. Ev., 275; 1 Hale P. C., 693.

5. To this there can be no answer, unless it be that by the divorce act, the marriage to Mary Richards is recognized as *voidable* only. By the common law, illegal marriages were distinguished into *void* and *voidable*. The canonical disabilities, consanguinity, affinity, and corporeal infirmity, etc., rendered marriages voidable only, but the civil disabilities, prior marriage, under age of consent, idiocy, etc., render the marriage, *void ab initio*, and the union meretricious. 2 Kent 96, 1 Bl., 436-40.

By the common law, where the first marriage was only *voidable* it was no defense to an indictment for bigamy, but otherwise if *void*. 135 1 Arch. Cr. Pl., 358-9.

6. Does the divorce act (statute p. 291) recognize the marriage (to Richards) as *voidable*. The statute has no such object as to abolish the common law doctrine that such marriage is *void ab initio*. Its purpose is to provide for divorces, in order that the relation of person may be legally established. Judge WALKER, in his American Law p. 229, is of opinion that the granting of divorces for causes which render marriage *void ab initio*, is one of the inherent powers of the court, and would exist independent of the statute. This cause of divorce is given because the marriage is *void*. If *voidable* only, then the parties may affirm it—for a voidable marriage is one which may be affirmed by the parties, and is valid for all civil purposes. It will not be pretended that Mary Richards' marriage could be affirmed by the parties, for such affirmance is a

crime punishable by imprisonment in the penitentiary. The same power of granting divorces exists in England, where the ecclesiastical court will grant a divorce on account of prior marriage; and hence the fact that our court will do the same, has not rendered such marriage *voidable* only. 1 Chitty's Bl., 487; 2 Phil. Ecc. C., 324; 3 Bl., 94-5.

The court, Judge SWAN presiding, instructed the jury that the authorities were clear that the defendant could not be found guilty upon the facts. The jury accordingly returned a verdict of *not guilty*.

The court then ordered the defendant into custody to answer an indictment for bigamy in marrying Mary Richards, having another wife (the one married in Virginia) living.

A special grand jury was impanelled, who found an indictment accordingly, to which the defendant pleaded *guilty*, and was by the court sentenced to three years' imprisonment in the penitentiary.

STEAMBOAT LAW.

174

[Superior Court of Cincinnati, October Term, 1845.]

BOYCE, Owner of the Steamboat JOHN O'FALLON v. The Steamboat EMPRESS.

[Reported by the EDITORS, from the Notes of the JUDGE.]

Held, That, under the statute authorizing proceedings against steamboats by name for injuries, or causes of action arising *ex delicto*, where the owners would be liable at common law, the party injured may sue the owners, or the boat, at his election.

For such causes of action, the boat is held from the date of the seizure, to answer for the damages; the plaintiff may recover until legally discharged: the statute gives no other lien; it is merely a right to maintain a suit *in rem* to enforce payment of the damages arising from the injury.

This remedy for such causes of action is not confined to injuries done within the state; but the boat must be one navigating the waters within, or bordering upon the state. 175

A boat which ordinarily navigates a river bordering upon the state, comes within the statute.

In cases of collision, the question is, whether proper measures of precaution were taken to avoid the collision.

Reasonable precautions are required.

Custom of the river and usage of navigation, define these measures of precaution.

Parties navigating are bound by the custom of the river.

Until settled by adjudication, or so established as to become a part of the law, without proof, the custom or usage is a matter to be proved, and its existence a question for the jury.

Plaintiff must show ordinary care on his part as well as negligence or misconduct on the part of the defendant.

If the collision is a pure accident, or if the fault is wholly with the plaintiff; or if plaintiff and defendant are *equally* in fault, plaintiff cannot recover.

There may be faults to a certain extent on both sides, and yet the plaintiff entitled to recover.

If the plaintiff's fault substantially contributed to the occurrence of the injury, not to its amount, but directly to the occurrence of it, he cannot recover.

If the collision arose from the negligence or misconduct of the defendant, independent of the fault of the plaintiff, the plaintiff can recover.

This was an action on the case brought by the plaintiff, as owner of the steamer John O'Fallon, against the steamboat, Empress, under the

provisions of the statute of Ohio, authorizing proceedings, in certain cases, against steamboats and other water craft by name, to recover damages for destroying the steamer John O'Fallon, by collision, on the night of the sixth of January, 1845, in the Mississippi river. The damages were laid at \$20,000. Plea, not guilty.

The plaintiff offered to read sundry depositions, to prove that the plaintiff was the owner of the boat John O'Fallon; that this boat and the Empress were steamboats, ordinarily navigating the waters bordering upon this state; that the O'Fallon was descending, and the Empress ascending the river; that by the carelessness and negligence of those in charge of the Empress, a collision occurred between these boats, near Point Chicot, in the Mississippi river, by which the O'Fallon was totally lost.

Mr. Fox objected. This action is against the boat by name, brought under the provisions of the statute. The plaintiff is a non-resident of the state. A boat cannot be seized here under that statute for an injury done out of the state. This remedy applies only for injuries done while navigating the waters within or bordering upon the state, and cannot be resorted to for injuries committed on the Mississippi river, without the territorial jurisdiction of the state.

176 This objection, as well as the construction generally of the statute, was argued by Mr. Fox, for the defendant, and Mr. Walker and Mr. Corwine, for the plaintiff.

COFFIN, J. Without intimating any opinion upon any of the various, and certainly difficult questions which have been discussed, except so far as is necessary to determine the question now presented, I shall for the present, hold, that, for injuries, or causes of action, arising *ex delicto*, where the owners would, at common law, be liable, the statute gives a right of action against the owners of the boat, or the boat itself by name, at the election of the party injured. It gives a right to maintain a suit *in rem* to enforce payment of the damages arising from the collision.

For such causes of action the statute merely provides the remedy. When the boat is attached, from the date of the seizure she is held to answer for the amount which the plaintiff may recover, and from that time the plaintiff has a lien, in one sense of the word, upon her for the amount of his judgment, until she is legally discharged. Until then, she is in *custodia legis*. For these causes of action the party injured has no other lien upon the boat.

This remedy for these causes of action arising *ex delicto* is not confined to injuries done within the state; but the boat to be liable to be seized, must be a steamboat navigating the waters within or bordering upon the state; this is a class or description of property which the statute authorizes the party injured to sue, instead of the owners. A steamboat which ordinarily navigates a river bordering upon the state, comes within the class of property described in the statute.

The plaintiff will proceed with his testimony.

The parties then proceeded with their testimony; it was voluminous and contradictory. The object being to report the legal points held by the court, the testimony is omitted.

The cause was argued to the jury by Messrs. Spencer and Walker for the plaintiff; and Messrs. Lincoln and Fox for the defendant.

The counsel during the argument, referred to the following authorities in reference to the law applicable to the case; 38 E. C. L., 254, 255,

252, 245; 1 West. L. J.; 28, and authorities there cited; Story on Bailments, 385; 14 E. C. L., 429; 24 E. C. L., 365, 391; 25 E. C. L., 262; 6 L. Rep., 117; 2 Pickg., 621; 12 do., 177; 21 do., 255, 22; E. C. L., 280; 1 Cowen, 78; 1 M. & M., 169; 1 Howard, 28; 19 Wend., 399.

The plaintiff asked the court to charge the jury, that, when danger became imminent, it is as much the duty of the ascending boat to stop, as for the descending boat, and that if her neglect to stop in season was the immediate and substantial cause of the loss of the O'Fallon, the verdict must be for the plaintiff. 177

The defendant asked the court to charge—

1. That if ordinary prudent navigators of a descending boat at that stage of the river, and in that portion of the river would have laid up above that place in the river, until daylight, and the plaintiff neglected to lay up, but run, contrary to prudence, and the running at night contributed to the loss, the plaintiff cannot recover.

2. If the plaintiff's boat, by neglecting to continue to float, by starting ahead after the danger became imminent, contributed to the loss, the plaintiff cannot recover.

COFFIN, Judge, in his charge to the jury, said that in all these cases of collision, the question is, whether proper measures of precaution were taken to avoid the collision. Every boat navigating the river is bound to make use of all reasonable precautions to avoid injuring others. These measures of precaution depend, in a great degree, upon the custom of the river and usage of navigation, as connected with steamboats. This custom or usage, when shown to exist, becomes binding upon those who navigate the river.

To ascertain the custom of the river—the usage of navigation—how and in what part of the river the ascending or descending boat should run—what are the usual and customary precautions which boats are bound to take to avoid those collisions, the jury will look to the testimony. They will look to the transaction, and the conduct of the parties in reference to the custom and usage of navigation.

Each party when navigating the river has a right to, and should act upon the presumption that the other party will observe the usage of navigation and the custom of the river.

The plaintiff says that the steamer Empress, through the carelessness, unskillfulness and improper conduct of those in charge of her, ran down the steamer O'Fallon. This the defendant denies. This is the issue, and the plaintiff has the affirmative.

He must show ordinary care and diligence on the part of the O'Fallon, and negligence or misconduct on the part of the Empress..

There was a collision. How did it happen? If it was a pure accident, the plaintiff cannot recover. If the fault was wholly with the O'Fallon, the plaintiff cannot recover. 178

If a boat should disregard the custom of the river and the usage of navigation, and another boat, in consequence of that disregard, come in collision with her, using reasonable efforts to avoid the collision, as soon as the danger should be discovered, the boat so disregarding the custom and usage, must suffer the consequences, because it was her fault.

If both were *equally* in faults, the plaintiff cannot recover.

But there may be fault to a certain extent on both sides, and yet the plaintiff entitled to recover. Because a boat is in some degree in fault, it does not authorize carelessness or negligence on the other; she should,

as soon as the condition or position of the approaching boat is discovered, use such reasonable efforts as the circumstances will admit, to avoid the collision. This fault upon the part of the plaintiff, must be only to a certain extent; for if the fault substantially contributed to the occurrence of the injury, not to its amount, but directly to the occurrence of it, he cannot recover.

If a boat were out of her place, and damaged by collision, or neglected an ordinary and proper measure of prevention, to enable her owners to recover, it would require proof on their part to show that the collision was not owing to her fault or neglect, but arose from the carelessness or negligence of the other boat. If it appeared that the fault of the plaintiff did not substantially contribute to the collision; did not directly tend to the injury; that with reasonable effort the defendant might have avoided the collision, and did not; that the collision arose from the negligence or misconduct of the defendant, independent of the fault of the plaintiff, then the plaintiff would be entitled to recover. If, however, this fault of the plaintiff substantially contributed to the occurrence; directly tended to produce the injury, the plaintiff could not recover.

If a collision occur where one boat has disregarded the custom or usage of the river, and the other might with reasonable effort have avoided it, and the boat which might have so avoided it is damaged, she cannot recover against the other boat, because she did not use ordinary care and diligence.

To apply these principles to this case, the jury must look to the proof. To know whether the plaintiff used ordinary care and diligence—whether the collision arose from the carelessness or negligence of the *Empress*—or whether it arose from the fault of the *O'Fallon*, you must examine the testimony. You must know how these boats were navigating the river before the collision—how and where, by the custom
179 and usage of the river, they were bound to run—how to navigate—where, according to the custom, each boat had a right to believe the other was running, and would run—what precautionary measures each was bound to take as they approached each other—what they each had a right to expect from the known usage of the river, the other would do—what they did severally do.

If you can satisfactorily learn these things, you will be enabled to determine whose fault caused the collision.

In answer to instructions asked by the plaintiff and defendant to the jury, the judge said that he had already instructed the jury, that the parties were bound by the custom of the river, and the usage of navigation, when that custom or usage was shown to exist; that the custom or usage, until settled by solemn adjudications, or so established as to leave no doubt of its existence, so as to become a part of the law without proof, was a matter to be proved, and the existence of the custom or usage was a question for the jury. The parties had offered testimony upon the rules of river navigation. By reference to the proof, he thought the jury would learn that, as a general rule, in case where collision was to be apprehended, it was the duty of the descending boat to stop her engine, and float, leaving the ascending boat to do the "dodging;" that the ascending boat was expected to do the manœuvring, but where that could not be safely done, and the danger became imminent, it was also the duty of the ascending boat to stop her engine; that applying this rule to this case, if the position of the *Empress* was such as to re-

quire her to stop her engine, and if her neglect to stop in season was the immediate and substantial cause of the collision, without the fault of the O'Fallon contributing directly and substantially to the same, the plaintiff was entitle to recover.

That if the O'Fallon neglected to continue to float, but started her engine ahead after the danger of collision became imminent, and that substantially contributed to the occurrence of the injury, the plaintiff could not recover.

That if at that stage of water and in that part of the river, by the custom and usage of navigation, the O'Fallon should have rounded to and laid up above the place of collision until daylight, and she neglected to do so, and the running at night substantially and directly contributed to the occurrence of the injury, the plaintiff could not recover.

The plaintiff says, his fault, if any, did not substantially and directly contribute to the collision; that he used ordinary care and skill; that the collision arose from the negligence or misconduct of the Empress. All this is denied by the defendant. Your verdict must determine it. If you find for the plaintiff, he is entitled to damages to the extent of the injury occasioned by the negligence of the defendant.

Verdict for defendant.

The plaintiff afterwards moved for a new trial, which was overruled by the court, and judgment entered upon the verdict.

COMMERCIAL LAW.

220

[Clinton Common Pleas, Ohio, November Term, A. D. 1845.]

JOSEPH RAPP V. JAMES H. WILKERSON.

[Reported by F. P. LUCAS.]

A note payable when James K. Polk should be elected President of the United States, is valid, it being averred and proven that the election so terminated.

The declaration contains two counts,

1. On a note in these words—

"CLARKSVILLE, Oct. 1st, 1844.

"Due Joseph Rapp, fifteen dollars, when James K. Polk is elected President of these United States, for value received.

JAMES H. WILKERSON."

2. For goods sold and delivered, to-wit, one clock of the value of fifteen dollars.

Defense, that the contract was a bet on the presidential election. Evidence disclosed the following facts. At the date of the note, plaintiff was a pedlar of clocks. Both before and after his arrival with a load of them in Clarksville, he offered to sell on the following terms: For ten dollars cash in hand, or fifteen on time, until Mr. Polk was elected president. That a like difference was usual between cash and credit. Some witnesses understood him to say, if Mr. Clay was elected he was to have nothing. Defendant purchased a clock on the latter terms, which was immediately carried to and put up in his house, where it has remained in his possession ever since the contract. That after Mr. Polk's election, about Christmas, 1844, plaintiff called on defendant for pay for his clock, which was promised in a week from that time. The execution of the note which is copied in the declaration and offered in evidence, was

admitted, and also that the event upon which it was payable, had happened previous to the commencement of the suit before the justice of the peace.

Hinkson and Lucas, for plaintiff, cited, 1 Scammon, Ill. R., 577; 3 do., 525, 532; 12 Johnson, 35.

R. B. Harlan, for defendant. The note on which this suit is brought, originated in a gambling transaction; a bet laid upon the presidential election. This is made evident by the proof. The note itself is evidence of it.

Such transactions come within the very letter of our statute. They are just such mischiefs as the statute was intended to uproot.

If the proof establishes a bet, the plaintiff cannot recover. A bet upon an election is prohibited by our statute, under a penalty. Swan's Col. Stat., 254, section 1. Such a bet is void at common law, 9 Cowen's Rep., 149 and note; 4 Johns R., 434; 1 T. R., 56.

Plaintiff's counsel have shown that in Illinois a bet upon the president's election may be recovered. But Illinois stands alone upon this question. In that state there is no statute against betting upon the election of president. Betting upon the election of state officers is prohibited, and cannot be recovered.

A court of justice should not take cognizance of betting cases. They are not bound to do so. In England, and I believe, in some of the states of this union, the courts have refused to try such causes.

Hinkson and Lucas, in reply.

This contract does not fall within the prohibition of any statute of Ohio, nor is there any analogy between it and such as have been declared void by any judicial decision, entitled to the favorable consideration of the court. To constitute a wager, each party must hazard something. Value is never received, unless by a winner. Here the defendant receives his value in hand, which can never be taken from him by the happening of the event upon which he promises to pay. Contracts of this kind have always been held valid. The only question is as to time. The event having happened, the action is clearly sustained on the note itself, and his subsequent promise places defendant's liability beyond all doubt, under the proof for goods sold and delivered.

Judgment for plaintiff, for \$15.60, and costs.

(A bill of exceptions was taken on the part of the defendant; but it has not yet been taken up; if it should be, due notice of the decision will be given.)

471

[Supreme Court, Clinton County, Ohio, May Term, 1846.]

Before Judges Wood and Hitchcock.

JAMES H. WILKERSON V. JOSEPH RAPP.

[Reported by F. P. LUCAS.]

IN ERROR.

This case was decided in Clinton common pleas, Judge VANCE presiding, November term, 1845, in favor of the plaintiff below, and reported in the Law Journal for February, 1846, pages 220, 221. It was taken up in error, and the judgment of the common pleas affirmed. For particulars, see the report in this journal above referred to, pages 220, 221.

WOOD, C. J., delivered the opinion of the court.

BY-LAWS.

222

[Athens County, Ohio, Supreme Court, December 15th, 1845.]

Before Judges Read and Hitchcock.

MADISON HOLMES V. PICKERING & CARLEY.

[Reported by O. W. BROWN.]

A by-law of a Toll Bridge Company, prohibiting the dragging of timbers, stone, etc., over its bridge, and requiring such articles to be raised on wheels, or otherwise is a reasonable and valid by-law and may be enforced.

A contract by the company with a passenger to receive of him a gross sum for the year in lieu of tolls by the trip, does not preclude the company from enacting reasonable by-laws to regulate the manner of crossing its bridge.

Whether such by-laws are properly adopted, and are reasonable and valid, are questions of law to be decided by the court, and not questions of fact for the jury.

IN ERROR.

This was an action on the case brought by the defendants in error, against the plaintiffs in error for stopping their team, and preventing its crossing the West Toll Bridge at Athens, and was originally brought before a justice of the peace, at the October term, 1842, of the common pleas. The plaintiffs below obtained a verdict and the defendant filed his bill of exceptions, which shows the following facts: In the early part of January, 1841, the defendant, as gate-keeper of said bridge, agreed with plaintiffs to receive of them ten dollars, in lieu of tolls for the year 1841, for the crossing of the plaintiffs, their teams, horses, etc., nothing being said about the manner of crossing—that under a similar contract in 1840, with the former gate-keeper, plaintiff had been permitted to haul timber over said bridge, supported on wheels only at the forward end, and there was no distinct proof of any objections having been made thereto, prior to, or at the time of the making of said contract, with defendant. That on the 16th of January, 1841, after the date of said contract, the directors of the "West toll bridge company of Athens," to which company said bridge belonged, enacted a by-law prohibiting the dragging of timber, stone, etc., over said bridge, and requiring all such loads to be raised on wheels or otherwise, and prohibiting the passage of any loads over said bridge not chargeable with tolls under their act of incorporation. That the 8th section of said act, (Ohio Local Laws), conferred upon said company the power "to adopt such by-laws, rules 223 and regulations for the government of the same, as are not inconsistent with the constitution and laws of the United States and of the state." That in August, 1841, the defendant stopped, and prevented the team of the plaintiff from crossing said bridge with a heavy piece of timber, supported by wheels only at the forward end, in violation of said by-law, of which plaintiff had repeated previous notice, which stopping was the act complained of by the plaintiffs.

The court charged the jury that plaintiffs having been permitted to haul timber in this way the previous year without objection, they had a right to haul in the same manner, and that any regulation made by the bridge company after the date of said contract, could not affect this right.

The defendant asked the court to instruct the jury that by virtue of their act of incorporation and the general law of the state, (Swan's

Statutes, 163), as well as inherently for the preservation of their property, said company had a right to adopt said regulation, and to enforce it, and that said defendant was justified in stopping said team, which instruction was refused.

At the November term, 1843, of the supreme court in Athens county, before Judges READ and BURCHARD, this case was heard on error upon a transcript of the record in common pleas, the judgment was reversed and the case remanded.

At the February term, 1844, of common pleas, there was a trial by jury, a verdict for plaintiffs, and a second bill of exceptions taken by defendant, which differs from the first only in the instructions to the jury, which were "that the plaintiffs, at the time they made their contract for using the bridge for the year to come, as nothing was said as to the manner in which they should haul their timber across the bridge, had a right to expect that they should occupy the bridge in the same way, and haul their timber across in the same manner for the year to come as they had in the year past, and that they had a right to so cross and pass, unless the manner in which they were taking their timber across said bridge, was unreasonable and injurious to said bridge, which, if it was, the stockholders might prohibit. But if their mode of using was not injurious, the stockholders could not, after the contract was made, pass a by-law to require plaintiffs to cross the bridge in any different manner from that one they had been in the habit of crossing the previous year, by suspending their timber, unless the manner was injurious to the bridge."

224 The defendant asked for the same instructions as upon the former trial, and was refused.

At the December term, 1845, of the supreme court, this cause was again heard on error, and it was held, "That there is error in this, that the court refused to charge the jury that the same by-law of said bridge company was properly adopted and might with propriety be enforced, the court being of opinion that the question whether a by-law of a corporation is a valid act, is a question of law to be decided by the court, and not a question of fact to be left to the jury." Judgment reversed, and cause now ended for the proceedings.

A. G. Brown & O. W. Brown, for Plaintiff in error.

Wm. Wall & John Welch, for Defendant.

The second writ of error was allowed in open court, at the November term, 1844, before Judges WOOD and LANE.

EVIDENCE.

[Court of Common Pleas, Hamilton County, Ohio, May Term, 1845.]

WALES V. BATES.

[Reported by T. WALKER.]

Parol evidence is admissible to prove a promise made at the time of executing a general release under seal, when that promise was the inducement to execute the release.

This case was tried by the court on submission. The plaintiff is the widow of John W. Wales, deceased, who was a partner of the defendant. As Wales left no children and no debts, no administrator was appointed and the defendant settled the partnership affairs with the plaintiff, pay-

ing her an agreed sum of money for the interest of her husband and taking from her a general release of all claims under seal. At the time of making this settlement, a suit was pending by *Bates & Wales v. Perry, Kellogg & Co.*, to recover the value of certain merchandise, which, as forwarding merchants in New Orleans, they had neglected to forward; and the plaintiff claimed one-half of the amount which should be recovered in this suit, and asked to have it provided for in the release. Defendant acknowledged her claim, and promised to pay it, if he succeeded in the suit; but objected to have it mentioned in the writing, saying that his word was as good as his bond, and pledging his honor to make good his verbal promise. As the plaintiff held the pen for the purpose of signing the release, she again requested to have this promise in writing; but upon a repetition of the defendant's verbal promise, she signed the paper. The attesting witness, her brother, before signing his name, expressed a similar desire; but the verbal promise was reiterated, and he attested the release.

The suit of *Bates & Wales v. Perry, Kellogg & Co.*, was successful, and the present action was brought to recover one-half of the amount therein recovered. The defendant set up the release as a bar; and the question was whether the above facts could be proved by parol.

T. Walker and *A. G. W. Carter*, for plaintiff, insisted that this was a distinct and substantive promise, which formed the inducement for executing the release, and that to reject the evidence offered, would be to enable the defendant to commit a fraud; on either of which grounds the evidence was admissible. They cited *Roscoe's Civ. Ev.*, 9; 2 *Saunders's Plead. and Ev.*, 699; 2 *Starkie*, 573; and *Morancy v. Quarles*, 1 *McLean's Rep.*, 194.

A. E. Gwynne and *J. H. Bates*, for defendant, contented that to admit this evidence, would be a violation of the rule, that parol evidence cannot be admitted to contradict a written contract. They cited *Greenleaf's Ev.*, 351; *Pierson v. Hooker*; 3 *Johns.*, 68.

The court, *CALDWELL, P. J.*, held the parol evidence admissible on both the grounds urged by plaintiff's counsel, and gave judgment for the amount claimed.

DECREE—WHEN SET ASIDE.

305

[Superior Court of Cincinnati, January Term, 1846.]

CHARLES WAYNE ET AL. v. THE WASHINGTON MUTUAL INSURANCE COMPANY ET AL.

[Reported by T. WALKER.]

Where defendants have been duly served with a subpoena in chancery, and are in default, and a decree *pro confesso* has been regularly taken against them, they will not be permitted, at a subsequent term, to open the decree and file an answer, unless, in addition to the disclosure of a meritorious defense, they furnish a reasonable excuse for their delay.

That the defendant did not consider complainant's claim as of sufficient importance to require a defence, is no excuse whatever for him; but the neglect for that reason by the defendant's agent, whose duty it was to defend, will not be imputed to the defendant who applies for leave to defend, and the negligence of the agent is a sufficient excuse where the complainant cannot be injured by the delay, and the defendant has no other relief.

This was a bill in chancery, in which complainants set up an equitable title to land of which defendants, the Washington Mutual Insurance

OHIO DECISIONS.

Superior Court of Cincinnati.

gal title, and praying for a conveyance. Processed, and the defendants being in default for answer, on the 15th of September, and confirmed on the 8th in the rules of the court. This decree directed y, upon being paid certain charges by complainants, a master to ascertain the amount. At the next Jan- ce company moved to have the decree opened, and er, which was produced, setting up the defence of in- hout notice. The affidavit, which was made by the any, set up the following excuse for the default : ner says, that he supposed the claim of the said retence without right, and that he was advised by s of said company that the said claim was wholly s would receive no favor in a court of equity; that, l and labored under the mistaken belief, that what- ure of the claim aforesaid, the company was not tention to it, but that the warrantor of the said aid company, John H. Groesbeck, who was also a was bound to defend the title, and was so defending itly he employed no attorney," etc.

an, in support of the motion.

r, *contra*.

estion is made whether the decree entered in this ocutory decree.

fine what is an interlocutory and what is a final de- rms so as, at all times, to determine by that defini- decree belongs. Decrees under our practice may ve the parties a right to appeal, and yet, according s, be an interlocutory and not a final decree.

ee in this case is interlocutory, or, as claimed by l, is not necessary, for the purposes of this motion, settled that it is in the power of the court to set by default, for the purpose of giving a defendant re a defence when such defence is meritorious, and in relation thereto, either by mistake or accident, his solicitor. *Erwin v. Vint*, 6 Munf., 267; *Mills- age*, 512; *Beckman v. Peck*, 3 Johns. C. Rep., 415 ; 368.

show a meritorious defence. If this decree is per- defendants are concluded. I do not see that they ehearing or by a bill of review. They have no re- an set aside the decree and permit them to answer. rs of this company have been guilty of negligence nis case. Their excuse for this neglect to answer are personally concerned, is no excuse whatever, defendants, I would not be disposed to interfere. ividual rights which are affected; they are agents property in question is held by the company and ers in trust for others. It is part of a trust fund racts of the company, controlled by its agents for litors and the individuals composing the company, ose.

In *Millspaugh v. McBride*, the defendant's solicitor was guilty of unpardonable neglect, and, I may say, gross negligence. He advised the defendant to suffer the bill to be taken as confessed, permitted the complainant to take the decree by which the rights of his client were concluded, and all this time had never looked into the bill; yet the court, after a sale of the property to the complainant, set aside the order taking the bill as confessed, discharged the enrolment of the decree, cancelled the master's deed, and permitted the defendants to answer and defend.

It may be said that the officers of the defendants are responsible for any injury resulting from their negligence. So, undoubtedly, was the solicitor in the above case, and it does not appear that that had any influence in the decision of the motion.

Whether liable or not, where no possible injury can result to the complainants, and irreparable injury may result to the person really interested, it seems to me that justice will be more properly administered by setting aside the decree and permitting the merits of the case to be heard, than to allow the decree, obtained by a default owing to the negligence of the agent or officer whose duty it was to see to the defence, to stand.

I shall, accordingly, order that the decree be set aside, that the defendants have leave to file their answers, setting up the defence disclosed, upon the payment of all costs which have accrued up to this time.

DEED OF HUSBAND AND WIFE.

360

[Superior Court of Cincinnati, January Term, 1846.]

LESSEE OF REBECCA FEAGLY V. HIGBEE ET AL.

EJECTMENT.

[Reported by T. WALKER from notes of the Judge.]

By the statute of 1831, husband and wife must execute the same deed to convey or encumber the wife's estate, but it does not require a joint execution. A deed executed on one day by the husband, and on a subsequent day by the wife, binds her and her heirs.

The plaintiff proved that one C. Park died intestate, seized in fee of the premises in question, and that Rebecca Feagly was one of his heirs at law, and (the possession of defendants being admitted by the consent rule) rested his case.

The defendants offered in evidence a deed from the heirs of C. Park, for the premises, to one Perry. This deed was dated 30th June, 1834, was signed, sealed, attested, and acknowledged in due form, on the same day, by *all* the grantors named in the deed (seven in number), including Caleb Feagly, the husband of Rebecca, except Rebecca Feagly. Her signature and seal also appeared upon the deed, attested by two witnesses, and a separate certificate of the justice of the peace that she, on the 15th January, 1835, acknowledged the same before him. It did not appear from this certificate that the husband of Mrs. Feagly appeared with her before the justice at the time she acknowledged the deed.

This deed was objected to, but the objection overruled *pro forma*, and the deed admitted in evidence.

The defendants then traced title from Perry to themselves.

Another question arose during the trial, but it is unnecessary to notice it.

Fox & Kenna, for Plaintiff; *Morris & Riddle*, for Defendants.

COFFIN, Judge. From a literal copy of the deed from the heirs of Park to Perry, it would appear that Mrs. Feagly signed and sealed it on the 30th June, 1834, the day when the deed was executed by the other
361 grantors, including her husband, and subsequently on 15th January, 1835, without the presence of her husband, acknowledged it. It is claimed, however, that it is evident from an inspection of the deed itself, that she did not sign and seal it with her husband, but probably signed and sealed it on the day she acknowledged it. In the view I have taken of this question, that fact is not important.

It is a settled principle of the common law, that coverture disqualifies a feme from entering into a contract or covenant personally binding upon her. She labors under great disabilities, and is to some intents esteemed as dead. *These disabilities are for her protection and interest*; and they have been in particular cases, under specified forms, removed, and methods adopted by which a *feme covert* can make certain contracts which shall bind her.

In the notes to Coke upon Littleton, it is said that the law, while it confers great power in the husband over the wife's property, will not allow her, whilst a feme covert, to enlarge the provisions for him out of her property, or strip herself of any claims which the law gives her over his. On the contrary, jealous of his great authority over her, and fearful of using compulsion, it creates a disability in her to give her consent to anything which affects her rights or claims, after coverture, and make all acts of such a tendency absolute nullities.

To enable a feme covert to convey her lands, fines were used.

A fine, in its original, was founded on an actual suit commenced at law, for the recovery of the possession of lands. Subsequently they became fictitious, and were used as a mode of conveyance. In case of femes covert, fines were never allowed to pass without an examination of them, apart from their husbands. This examination was made when the wife was for a time beyond the influence and authority of the husband, to know whether her consent was the result of a free choice, or of the husband's compulsive influence.

As a general rule, femes covert were not admitted alone to levy a fine without their husbands, and yet fines have been levied by *femes covert* in the absence of their husbands.

In Moreau's case, 2 W. Blackstone's Rep., 1205, the husband sold the land. At first the wife refused to levy the fine. Her husband went abroad, and she afterwards consented to levy the fine, and her acknowledgment was taken by the chief justice of the common pleas. The husband did not join with the wife. The fine was levied without prejudice to his right to avoid it.

In *Stead v. Izard*, 1 New Reports, 312, the wife was permitted to levy a fine without her husband, he being at the time *non compos*.

362 *Compton v. Collinson*, 1 H. Bl., 334, is an authority, showing that, under some circumstances, a *feme covert* might levy a fine of what belonged to her.

In this case Lord Loughborough says, "That by the common law, a *feme covert* is incapable of disposing of her lands without the concurrence of her husband, is true, generally speaking, though not quite cor-

rectly expressed; for a *feme covert* has no power to convey with her husband, except by fine or recovery. It would be more accurate to state the law to be, that a married woman can make no conveyance of her lands except by fine or recovery, and that a fine levied by her alone is avoidable *only* by her husband."

The disabilities of a *feme covert* here are those of the common law, with but few exceptions.

Our mode of conveyance by her is not by fine. Our statute provides a much more simple method to attain the same end; but the examination of the wife as provided in the statute of many of the states, as well as our own, originated, no doubt, from this practice in England, and I think it has in view the same object. Judge BURNET, in giving the opinion of the court, in *Brown v. Farran*, 3 O. R., 155, says, that in "providing this mode of conveying real estate by *femes covert* in lieu of the common law method, by fine, two objects were in view: first, to simplify the transaction, and, secondly, to protect the wives of the grantors against the exercise of an improper influence, by their husbands."

This ancient mode of conveyance by fine, has never been used, and is unknown in this state; the ordinance of 1787 provided that real estate might be conveyed by lease and release, or bargain and sale, signed, sealed and delivered, etc. And whether our present mode was intended as a substitute for the more difficult mode by fine or not, the private examination of the wife apart from her husband, is strikingly similar to that mode where *femes covert* are passing fines, and can have no other object than the one intended by that mode. Against the influence and authority of the husband over the wife, it is right and proper to guard; as to other influences, I know of no reason requiring guards to protect the rights of married females in the execution of deeds that would not operate with equal force as to unmarried females. The policy of the law is, says a distinguished judge, "that a wife is not to part with her property, but by her own spontaneous and free will." When that free will is exercised and made manifest by the essential provisions of the law, she can part with her property, and the conveyance so made binds her and her heirs. When the deed is intended to convey or encumber her estate, such deed, says our law, shall be signed and sealed by the husband and wife. It must be signed and sealed by the husband, and it must be signed and sealed by the wife. In this she is to exercise her own spontaneous and free will; such is her declaration upon her separate examination. The signing and sealing by the husband and wife must be attested and acknowledged as prescribed for other grantors, and in addition thereto, the separate examination must be had. In all this, the wife acts independent of the husband. In all this she is as though not under coverture. Her disabilities are removed; her legal existence, which, as to most matters, is merged in that of the husband, is recognized. That legal unity, which for most purposes the law has created, is broken; she has a legal individuality, and possesses to the fullest extent the powers and capacities of a competent contracting party. As to the contract, which is evidenced by these several acts, the law contemplates separate action. It intends to make the wife, for that purpose, a *feme sole* to invest her with all the powers she possessed before coverture. She and her husband must execute the same deed, for so read the terms upon which her disabilities are removed and identity recognized, but I cannot see any thing which requires a joint execution. It seems to me that the whole

policy of the law, its spirit and object, requires separate and independent action. She is entitled to the advice and approbation of her husband; beyond that he is not permitted to go.

In this case the deed was prepared for husband and wife to execute; her name was inserted as a grantor, and it was first executed by the husband: of that there is no doubt. That execution is certainly strong proof that he approved of the measure. It is certainly a fair way of evidencing the opinion of the husband of the propriety of the conveyance, without danger of influencing her mind by the great authority his position commands. With the approbation of her husband manifested by his signature and seal, she is called upon to exercise her free will, to assent or dissent to the contract, to exercise her own judgment; and the law fearing there may be some secret influences operating upon her mind, specially enjoins a separate examination, to learn whether those several acts in the execution of the contract were voluntary on her part or not, and she is again called upon to express her own convictions of the propriety of the conveyance.

I am satisfied that the deed from the heirs of Park to Perry is a valid deed, and conveyed the interest of Mrs. Feagly in the premises in question.

Judgment for the Defendants.

364

MARRIED WOMEN.

[Marion County Court of Common Pleas, March Term, 1846.]

LAYTON V. CONOVER.

[Reported by Judge BOWEN.]

Where a married woman has been abandoned by her husband, who has removed to another state, resided there for seven years, and declared his intention of not returning to her, she may contract and be sued as a *feme sole*.

Assumpsit on a promissory note, dated November 25, 1843, payable nine months after date to Hannah Kishler, administratrix of Frederick Kishler, or bearer, \$32.13, signed by defendant.

The cause was submitted to the court upon a statement of facts agreed upon by the parties, as follows:

The defendant was married to Edmund Conover, in the state of New York, about fourteen years ago, where they lived together a short time, and from thence removed into the state of Ohio, and resided together five or six years, *when they abandoned each other*, without any intention of living together again, and have, for the last eight years, lived separate and apart without any correspondence, whatever; the defendant supporting herself and one female child, without any aid from her husband. The note was given, during this separation, for property purchased by defendant at the sale of an administratrix. The defendant's husband was at work at Fort Wayne, Indiana, in the fall of the year 1843, since which time he has not been heard from, but at that time expressed a determination to go further west, and never return to live with said defendant.

Rowe and Durfee, for plaintiff, cited *Gregory v. Paul*, 15 Mass., R., 31; *Abbott v. Bayley*, 6 Pick. R., 89; *Rhea v. Rhenner*, 1 Peters' R., 105;

Godman for defendant, cited and commented on *Ringstead v. Butler*, 26 Com. Law, R., 75; *Lewis v. Lee*, 10 Eng. C. Law R., 84; *Williamson v. Dawes*, 23 Eng. C. Law R., 280; *Marshall v. Rutten*, 8 Term R., 545; Bouv. Law Dic., title Abjuration.

BY THE COURT.

BOWEN, J. The authorities read by the plaintiff from Massachusetts, establish the rule to be, that where the husband and wife live separate in different states of the federal union, or where the husband resides in a foreign country and the wife here, the husband furnishing no support to, and holding no correspondence with her, and such separation has been induced by the neglect and cruel treatment of the husband towards the wife, and has continued for a great number of years, the husband evincing, by his acts, an intention to renounce, *de facto*, the marital relation, and the wife maintaining herself as a single woman, the latter may, in order to acquire subsistence, carry on trade and hold property in her own name as a *feme sole*; contract debts, and be sued and sue, as such *feme sole*, to recover the same. This is allowed as a favor to the wife, for having, by the marriage contract, merged her separate and individual capacity, surrendered up her right to make and receive contracts, and to transact business in her own name. She would, in case of abandonment by her husband, or in case of necessary separation from him for ill usage, and his refusal to provide proper support and maintenance for her, be in a most miserable condition, if she were deprived of employing her time and industry in the accumulation of a suitable subsistence, and for that purpose to make contracts binding upon herself, and such as she might, at her own option, and in her own name, enforce against others. The necessity of the case would seem to render such a rule almost indispensable. It is difficult to perceive how a married woman, thus situated, could get along without such privilege.

The case of *Rhea v. Rhenner*, in the *1st of Peters*, seems to adopt a more liberal rule than the one laid down in Massachusetts. The husband's *place of residence*, after his separation from his wife, was not, it would seem, considered material by the court. The judge says, that the "law seems to be settled, that, when the wife is left without maintenance or support, by her husband, has traded as a *feme sole*, and has obtained credit as such, she ought to be liable for her debts. And the law is the same, whether the husband is banished for his crimes, or has voluntarily abandoned the wife."

A decision of the point before the court, it is said, did not make it necessary to decide and adopt the principle laid down by the judge, and, therefore, that the remark is an *obiter dictum* not sustained by the authorities, and should not be referred to as a precedent. The case was a bill in chancery, filed by Rhenner against Rhea and others, in the circuit court of the District of Columbia. Elizabeth Rhea, one of the defendants, in 1812, was married to Robert Erskine, who left her in 1814, and continued absent from that time forward, furnishing her no support, and she continued to carry on business as a *feme sole* trader, in Georgetown. In 1817 a lot of land, the proceeds of her individual earnings, was conveyed to her by Magnes. In 1821 she married Rhea, Erskine having then, as she alleged in her answer, been beyond seas more than seven years. On the 13th of May, 1819, Elizabeth and Rhea joined in conveying the said lot of land to Rhenner, to secure a debt to him from Elizabeth contracted by her after her marriage with, and during the absence of Erskine, which deed stipulated, that if the debt was not paid

in two years, it should be held in trust, with power to sell the same, and apply the proceeds, etc. A few days before this deed was made to Rhenner, Elizabeth and Rhea fraudulently conveyed the same premises to William Erskine an infant son of hers, in fee in consideration of natural love and affection. The bill prayed that the deed to young Erskine might be declared void, and that the property might be sold to pay the debt due to Rhenner from Elizabeth. The court below decreed a sale of the land, from which the respondent appealed.

It was contended, in argument before the court, in behalf of respondents that Elizabeth being, at the time the debt arose, the wife of Erskine, could make *no contract*. On the other side, it was contended, that the absence of Erskine was equivalent to abjuration of the realm, or banishment, in either of which cases, the contracts of a married woman are valid by the laws of England.

The court, in the opinion delivered, commence by remarking: "The question submitted by the arguments of the counsel, is, whether the contracts and engagements of Elizabeth Rhea, made in the absence of her first husband, and prior to her marriage with the defendant, Rhea, are obligatory, and to what extent a woman who has been *abandoned* by her husband, may contract debts for which she is personally liable."

It was a material point for Rhenner to show that the promise to pay made by Elizabeth to him, was valid; that though married, and her husband living at the time, he gave her credit and took from her security for its payment; yet the absence of her husband was of such a nature as gave her the power to contract and be contracted with in her own name, as a single woman. The bill which was filed by Rhenner could only be sustained upon a valid and binding agreement. Both of the courts in passing upon the case, did give full force and effect to the agreement made by her to pay the debt she contracted with Rhenner. The absence of Erskine from his wife, and his refusal to furnish her support, were considered to be a voluntary desertion of her on his part, and equivalent to the

367 English rule of exile or banishment from the realm, although when the debt was contracted by her, he had not been absent five years. But, after sustaining this point in the cause, the court remark, that by the laws of Maryland, which must govern the case, a married woman cannot dispose of real property without the consent of her husband. The separate examination and other solemnities, required by law, are indispensable, and must not be omitted. The deeds executed by Elizabeth and Rhea, in May, 1819, are, therefore, inoperative and void. This is the only reason given by the court for not decreeing a sale of the land. The supreme court did not, however, dismiss the bill, but remanded the cause for further proceedings, to the circuit court; and it is a plain inference, that the court intended, by so doing, to permit Rhenner to take a decree for his debt, and if he established the fraud in the transfer to William Erskine, and showed that Elizabeth held an equity in the premises, though not empowered to convey the legal title, that such equity might be sold. There was a refusal by the supreme court to make such a decree, because the allegations in the bill against the infant were not proved, and the cause was remanded to the court below, where proof might be taken.

The case is, therefore, in our opinion, an authority on the point at bar. The report of it is imperfect, in not stating the circumstances under which Erskine left his wife, and where his residence afterwards was, and whether any correspondence was kept up between them. It

establishes, however, that the husband's separation from his wife, and his refusal to furnish her any support for a number of years, so far removes the disability of coverture, that she may trade as a *feme sole*, contracts debts, sue and be sued, as if the marriage relation did not exist.

In *Bean v. Morgan*, 4 M'Cord's R., 148, it was held, that if the husband *departs from the state* with intent to reside abroad, and without the intention of returning, his wife becomes competent to contract, and to sue and be sued as a *feme sole*.

In *Starret v. Wynn*, 17 Serg. and R., 130, it was held, that if a husband deserts his wife, and ceases to perform his marital duties, the acquisitions of property, made by his wife during such desertion, are her separate estate, and she may dispose of them by will or otherwise.

In *Gregory v. Pierce*, 4 Metcalf's R., 478, the court say, "the principle is now to be considered as established in this state, (as a necessary exception to the rule of the common law, placing a married woman under disability to contract or maintain a suit) that where the husband was never within the commonwealth, or has gone beyond its jurisdiction, has wholly renounced his marital rights and duties, and deserted his wife, she may make and take contracts, and sue and be sued in her own name, as a *feme sole*." "It must be a voluntary separation from and abandonment of the wife, embracing both the *fact* and *intent* of the husband to renounce *de facto*, and as far as he can do it, the marital relation, and leave his wife to act as a *feme sole*." 368

The cases cited by the counsel for the defendant, show the rule to be, in England, that where the contract of marriage has been entered into, the wife is never afterwards, during its continuance, entitled to sue and be sued, as a *feme sole*, except in case of a divorce, a *vinculo matrimonii*, or where the husband becomes, in the eye of the English law, *civiliter mortuus*, as in cases of abjuration, exile, transportation for crime, and where, from the time of his marriage, he was a *foreigner*, and continued to reside without the kingdom, and his wife to live separate and apart from him, within the kingdom. These, and the like, are the only cases where a married woman is permitted to sue or be sued. The English courts adhere, with great strictness to the rule thus narrowly prescribed. Whether it comports with sound sense, public policy, or the principles of humanity and natural justice, to limit, thus rigidly, the powers of married women, who are cruelly treated, and finally deserted by unprincipled and faithless husbands, and left without any maintenance or support, and thus forced to become paupers, or the subjects of charity, is a point which I think may be properly questioned. It does not occur to me that any mischief would ensue, that the marriage contract would be rendered any less sacred, by relaxing somewhat from such a rule, and vesting in the *feme covert*, power to contract for herself, whenever the necessity of the case makes it important for her to do so; that is, whenever the husband, by his improper absence from her, renders it necessary for her to procure a subsistence by her own aid; to perform for herself, and in her own behalf, the duties which are due to her from her husband, and which he neglects wholly to observe, and so far removes himself from her abode, as to divest from her the power of deriving a competence on his credit.

There being this distinction between the rule of England, and of several of the states of our own country, which ought we to adopt? I think the bare statement of the two, will show the latter to be the most reasonable, and better calculated to promote the ends of justice; more in

conformity with that pure system of jurisprudence which administers
369 full and adequate relief in every case of wrong which the various
relations, interests, duties and business of life are liable, either by
mischance or design, to produce. It may be, indeed, well doubted,
whether our own courts have yet extended the rule far enough in this
class of cases.

For eight years there has been a total separation between the de-
fendant and her husband. She has, during that time, by her own ex-
ertions, maintained herself and child. This she could not have done, if
she had been deprived of the right of making and enforcing contracts.
It has been this power of operating, as a *feme sole*, that has enabled her
to purchase property, and the same again to sell—to render services for
those who have sought them, in the variety of industrious pursuits, in
which the females of this country are accustomed to engage, and to sus-
tain, in her own behalf, suits, if necessary, to recover pay therefor. This
has occasioned no evil to any one. Her husband, during that time has
stood towards her in the character of a stranger. It is not shown where
his residence was, until the fall of 1843. Then he was in Indiana, ex-
pressing a determination never to live with defendant again. He did
not, as the facts agreed upon warrant us in believing, continue in a po-
sition, in reference to his wife, that enabled her to obtain necessaries
upon his credit. He furnished her no aid of any kind. He held him-
self out as discharged from all obligation to her, and she assumed the
same bearing towards him. We may suppose as a just inference from
the facts stated, that he was absent from her abode in parts to her un-
known. By his conduct and expressions, he brought himself clearly
within the rule laid down in the 4th of Metcalf. As far as he could do
so, by his abandonment and desertion of his wife, and his subsequent
course of conduct, he made a total renunciation of the marriage rela-
tion. His intention so to do, made known at the time of the separation,
has been faithfully kept on his part. But it is said that the parties
abandoned each other, thereby implying that both were in equal wrong, or
that the separation was by agreement between them. This conclusion
does not, necessarily, follow. His determination expressed to her, of
making the abandonment—of withdrawing himself entirely from her so-
ciety, and his relation towards her, may have induced her to relinquish
and yield up any intention of future cohabitation with him—to submit
herself to the perverse course resolved upon by him, and under deep
grief of mind, to resign herself to the consequences of it. This would
be on her part, an abandonment of her husband, a constrained renuncia-
tion and giving up of the conjugal relation she held towards him. The
370 phrase employed, in the agreement of facts, "*they abandoned each
other*," warrants in her behalf, and should receive this interpretation,
and ought not, without proof, to be taken as evidence of separation by
agreement, collusion, or by an act of hers.

Under circumstances of the kind above related, the note on which
this suit is brought, was given. And the defendant's counsel now in-
sists that she is not liable upon it, in consequence of her coverture.
We apprehend, that to sustain this defence, would be, to adopt a prin-
ciple, that, in its future application to this lady's contracts, might work
for her a much more serious injury than will be occasioned to her by the
payment of this note, the full value of which she has realized.

Judgment for the Plaintiff.

SLANDER.

380

[Superior Court of Cincinnati.]

AMPHLETT V. WARRINGTON.

[Reported by the Editor from Notes of the Judge.]

Where the declaration in an action of slander laid the speaking of the words on a day subsequent to the commencement of the suit, after verdict for plaintiff and motion in arrest, leave given to amend the declaration, and motion in arrest overruled.

This was an action of slander, tried at the October term, 1845: Verdict for the plaintiff. The defendant filed a motion in arrest of judgment, because the declaration alleged the speaking of the words at a day subsequent to the commencement of the suit; and the plaintiff moved for leave to amend the declaration.

The writ issued on the 19th October, 1843—the declaration laid the speaking of the words on the 5th November, 1843.

Mr. Scott, for Defendant.

Brough & Zinn, for Plaintiff.

COFFIN, Judge. A hasty examination of the authorities cited convinces me of the truth of the remark of Chief Justice PARSONS, in *Bemis v. Faxon*, 4 Mass., 265, "That it is not easy to reconcile all the cases upon this subject."

In *Sargent v. Dennison*, 2 Cowen, 515, a mistake in the declaration by which the cause of action was laid after the commencement of the suit, was amended after verdict, though it was made a ground of objection at the trial, and the point was reserved; and the court say: "We order amendments in cases like this at any stage of the cause."

Arnold v. Arnold, 3 Bingham, N. C., 81, was assumpsit; the writ issued on the 20th February, and the promise was laid in the declaration on the 27th February; after verdict for the plaintiff, the defendant moved to arrest the judgment, on the ground that on the face of the record the cause of action appeared to accrue after the issuing of the writ. The motion was overruled. The court held, that there was no ground for arresting the judgment.

The case of *Bemis v. Faxon* was decided upon the authority of *Sorrel v. Levin*, 1 Keb., 354, and is to the same point.

Where the object of an amendment is to do justice, courts are vested with extensive powers, not only by statute, but by common law, and it seems to me that this is a case requiring the exercise of that power. 2 S. and R., 219; 6 S. and R., 510.

Leave given plaintiff to amend, and motion in arrest overruled.

OCCUPYING CLAIMANT

[Delaware, Ohio, Common Pleas, March Term, 1846.]

DOE EX DEM BAKER v. JOHN SPINDLER.

[Reported by Judge BOWEN.]

In ejectment, where both parties claim under the same common source of title, and there has been a mutual mistake as to boundary, growing out of a mistake in the survey, the defendant is entitled to the benefit of the occupying claimant law.

Ejectment. The plaintiff's lessor made proof of title from Daniel Harris, (the common source of title to both parties to this suit) of the following premises, to wit:

"Being in the fifth township of the sixteenth range, and a part of the first quarter of the land appropriated to satisfy warrants for military services, and for propagating the gospel among the heathen, bounded as follows: beginning one and a half mile south of the northeast corner of the quarter aforesaid, thence running due south a half a mile, thence due west sixty rods, thence due north half a mile, thence due east sixty rods to the place of beginning, containing sixty acres." Whereupon judgment was given in his favor, that he recover his term, yet to come, in the premises.

The defendant then moved to be allowed the benefit of the statute for the relief of occupying claimants, and gave in evidence a deed, dated March 16, 1826, duly recorded in Delaware county, from Harris to James E. Smith, for a part of the foregoing quarter of land, "beginning at the southeast corner of the said quarter, thence north, on the line of said quarter, one hundred and sixty perches, thence west four hundred perches to the lands of said Smith, thence south, along the line of said Smith, one hundred and sixty perches, to the line of said quarter, thence east, along the said line, four hundred perches to the place of beginning, estimated to contain four hundred acres."

He next gave in evidence a deed to himself from Smith, dated August 7, 1832, for "lot No. *one*, containing one hundred acres in said quarter," which was also duly recorded in Delaware county. A *plat* was submitted by the parties, showing that lot No. *one* was taken off the east side of the tract conveyed to Smith by Harris.

Mr. Mendenhall surveyed out lot No. *one* in 1826, and found but one corner of the section marked, and that was the southeast corner of said lot one, and was supposed to be the corner fixed by congress. This corner, assumed by Mendenhall, in making his survey of lot one, to be the true corner of the section, is twenty-six rods *north* of the *real* corner of the section, which, necessarily extended the defendant's northern line of lot one twenty-six rods too far north, and overlapped, to that extent, the land of Baker. Spindler had made improvements twenty-six rods north of his *true* line, and upon the premises recovered by the plaintiff's lessor before this action was brought, to recover pay for which is the object of this motion.

George Stickler, a witness called by the plaintiff, stated that he had lived on the west side of the section thirteen years. In 1831 witness assisted to survey the land, and told Spindler he would have to move further south, as their lines were run and fixed further south. Spindler had, at the time witness so told him, built a house and made some improvements on the land.

Finch, for Plaintiff.

Powell, for Defendant.

By THE COURT—BOWEN, J.

Upon the above statement of facts, is the defendant entitled to have the improvements, by him made on the plaintiff's land, appraised, and to be paid for making the same?

The act for the relief of occupying claimants, passed March 10, 1831, under which this motion is made, specifies *five* cases where this peculiar relief may be allowed by the court:

1. Where an occupying claimant is in quiet possession of lands for which he can show a plain and connected title, in law or equity, derived from the record of some public office.

2. Where, being in such quiet possession, he holds the same by deed, devise, descent, contract, bond, or agreement, from any person *claiming title* derived from the records of some public office, or by deed duly authenticated and recorded.

3. Where he is in quiet possession of land, under sale on execution, against any person claiming title from the records of some public office, or by deed duly authenticated and recorded.

4. Where he is in possession under any sale for taxes, authorized by the laws of this state.

5. Where he is in quiet possession and claiming title to land under a sale made by executor, administrator, or guardian, or by any other person in pursuance of any order of court, or decree in chancery, and the purchaser has obtained title and possession without fraud.

If the case made by the defendant is within any of the cases here provided for, he is entitled to the proceedings which he seeks. There is no authority to go beyond the above plain provisions of the statute. 417 The most liberal construction, which its terms will warrant, should be applied to it by the courts. Still, however, the case must fall within some of the enumerations above specified, or the court will not be empowered to make an order for the valuation of the premises and improvements.

Two things seem necessary to entitle the tenant to this relief: 1. He must be in the quiet possession of the premises. 2. He must have, in support of such possession, *title*, by record or deed, to the premises in himself, or hold under some person who claims a title either derived from the records of some public office, or by deed duly authenticated and recorded.

If the motion can be sustained, it must be in consequence of the second class of cases provided for in the statutory enumerations. The title of Spindler is not within any of the others. It is from the nature of his title, and of his possession, that the court is to decide whether he is entitled to relief. His title must be such as shows, *prima facie*, a right to occupy the premises. It must be "plain and connected, in law or equity;" such an one as induced the belief, while occupying and improving the land, that he was in the possession of his own estate. When he can show, that the person, under whom he holds, at the time he placed him in possession, *claimed* title from the records of some public office, or by deed duly authenticated and recorded, he brings himself within the statute. This claim of title must, however, be made to appear by the production of record evidence, or by deed, else it cannot be sustained. The tenant, taking a conveyance from a person having such title, is authorized, if he

acquire thereby, also, the peaceable possession, to make improvements, and, upon being evicted by a better title, the party prevailing is held to the payment of adequate compensation, for the benefit his estate has received, by the application of labor and the expenditure of money, made by the party who has, in good faith, bestowed them, believing at the time the land to be his own. The principle of relieving against *accidents* and *mistakes*, so equitable in itself, applies, with peculiar force, to this description of cases, and a desire for its more extensive operation was what led to the enactment of the law on the subject of granting relief to occupying claimants.

The defendant has shown a deed from Harris to Smith, properly authenticated and recorded, for a tract of four hundred acres of land, commencing at the southeast corner of the section, and then running north, on the line of the quarter, one hundred and sixty rods, and then running west, etc.

418 It has not been proved, that either Harris or Smith knew where the corner of the quarter was. It had been established by the survey of the government, but its exact *identity* was a matter afterwards to be determined by another survey, or by ascertaining, in some other mode, where the corner, called for in the deed to Smith, was located. With this deed, giving boundary lines, courses and distances, and also quantity, Smith employed a surveyor, as the most common and always the most certain means of finding the corners of land, to survey out and establish the lines of his land, and to lay it off into lots. This duty Mr. Mendenhall undertook to perform; and commencing at a corner, which he and all concerned, at the time, supposed to be the one established by congress, he run the lines, and fixed the boundaries of lot one. This survey was acquiesced in, at the time, as accurate. It was made in good faith, by one competent to the task. Smith could, with great propriety, then *claim* that his deed from Harris covered the land so run out. He did so claim, and his deed, taken in connection with Mendenhall's survey, on which full reliance was placed, certainly gave authority for him to make the *claim*, and to transfer that claim to another. By his conveyance to Spindler he vested in the latter all of lot No. *one*, according to Mendenhall's survey. The deed embraced that land which had been designated, in his survey, as lot No. one, and both the grantor and grantee supposed its boundaries to be correct, and both supposed that the deed from Harris embraced the same land.

It appears, therefore, that Spindler went into the possession of this lot under a deed from Smith, which he caused to be recorded. The records of the county contained, before he obtained his title, a deed from Harris to Smith, thus showing himself in possession, by deed, under a person *claiming title* also by deed, duly authenticated and recorded. Against this title, Baker, in the action of ejectment, has recovered. This brings the defendant within the *words* of the statute, and most clearly within the spirit and meaning of it. It is true, that a *mistake* has occasioned all the difficulty in the case. It is true, that neither Smith nor Spindler held a valid title to the land in dispute, which point has been established by Baker's recovery. This mistake was not, however, discovered till after the improvements had been made, until some time after Spindler had been in the quiet possession of the land, claiming and believing he had a perfect title to it. Unless the statute applies to cases of this kind, there would be a failure of justice in many cases. It often happens, that the corners, originally established in the survey of government, as well as in-

dividual lands, by the lapse of time, or the decay of monuments, once erected to denote them, become difficult to find, and are, consequently, overlooked, and other points taken, under mistake, as the true corners. Lots of land are surveyed out, upon such erroneous bases, conveyances made, the settler goes in under his deed, erects a house and barn, clears off and fences fields, and gets them into a good state of cultivation, when it is ascertained that the corners of his land, by a former and more accurate survey, are some rods further south or north than he supposed. He has been, all the time, acquiescing in the corners pointed out to him when he bought, and believing most fully that he was occupying and enjoying his own land. But his neighbor, whose land joins his, discovers the error under which he has been making the improvements, and before a court proves himself the legal owner of the title, and ousts him from the further use and enjoyment of it. Cases of this kind are not uncommon, and when it is recollected that our northwestern country was surveyed out whilst in a state of wilderness, and the lines indicated by marks of the axe upon trees, and the corners by like marks, or by a frail post placed in the ground, which in a short time would disappear, by decay or other cause, it is matter of surprise that there are not more occurrences of the kind than we meet with. It was, therefore, very proper for the legislature to relieve, as far as possible, against such mischiefs.

It is apparent to my mind, that the statute was intended to embrace just such cases as the one now before us, and hence it employs the language, "holding under any person *claiming* title by deed duly authenticated and recorded." It is not incumbent on the occupant to show, that his grantor was the actual and legal owner of the premises, but only that by record or deed he *claimed* to be. If there is a failure of such claim, by the adduction, subsequently, of a better title, the statute operates in giving relief.

The defendant's motion is allowed.

BANK NOTES.

448

ARNOLD v. PHILLIPS.

Depreciated Bank Notes—Advertisement to take them for goods binding—Tender—Delivery.

[From the Dayton Journal.]

This was a writ of error, brought to reverse a judgment of the common pleas of this county. The action was originally commenced before a justice, and was for goods sold and delivered. The justice rendered judgment for the plaintiff, from which an appeal was taken to the common pleas. The declaration was for goods, etc., sold and delivered. The defendant pleaded *non assumpsit* as to all but \$55.73, the real amount of indebtedness, to which he pleaded a special agreement and tender, and the replication put these facts in issue. This plea is substantially proved by the testimony, and we therefore omit it. The facts as found and certified by the common pleas are as follows:

That the parties are merchants, residing in the city of Dayton—that on the 8th of May, 1845, Arnold advertised in the *Western Empire* a paper published in said city, as follows:

"ST. CLAIR MONEY.—Notes of the above bank taken at par for goods at Arnold's, corner of Main and New Market streets."

The advertisement was read by Phillips on the morning of that day, and upon reading it, he said he would now go and buy some goods, and left his store with some St. Clair money in his pocket, and during the forenoon he applied to Arnold, at his store, to purchase goods, which he, Phillips, said he wanted for a customer, who was at his store, waiting for them. Arnold, the plaintiff, showed him goods, and he selected to the amount of \$55.73—the goods being selected by the piece, and at less than the retail price. Nothing was said by either party how, or in what funds the goods were to be paid for. The goods being selected and laid aside, Phillips left the store of Arnold, who sent the goods by a clerk to the store of Phillips, with instructions not to take St. Clair bills. The clerk left the goods at the store of Phillips, without communicating the instructions, and returned to the store of Arnold, who sent him back in a few minutes, to tell Phillips, that he, Arnold, would not take St. Clair money for the goods—must have good money, or a return of the goods—which Arnold's clerk communicated to the clerk of Phillips—Phillips being absent then, as well as when the clerk first went with the goods. Phillips had on hand \$100 of the St. Clair bills, which were worth from twenty-five to forty per cent on their numerical value. In the afternoon of the same day, Phillips offered and tendered to Arnold in that kind of bills the price of the goods, which A. refused to receive. The tender was kept up, and the bills tendered were brought into court for the plaintiff.

On this state of pleadings and proofs a majority of the common pleas judges rendered a judgment for the defendant—the president judge dissenting; and the cause was carried to the supreme court by writ of error.

Lovell for Plaintiff

John G. Lowe, for Defendant, cited in argument, 1 *Barn. and Ald.*, 681; 6 *Wendell*, 103., etc.

Wood, C. J., delivering the opinion of the court, held, that the advertisement of Arnold was a proposition to the public to sell goods, and to receive payment therefor in the bills of the bank of St. Clair at their numerical value: that the proposition was general and indefinite in its terms as to time, and must be considered outstanding until publicly withdrawn, or unless notice that it had been withdrawn was given to each individual purchaser; that the proposition being to the public, any one had a right to accept it; that Phillips having seen the advertisement, and having purchased goods on the faith of it, the contract to receive payment in St. Clair money was complete, and could not be receded from, the moment the goods were delivered; that the delivery of the goods was complete when they were left at the store of Phillips by Arnold's clerk, and that the fact of the clerk's being instructed by his principal not to receive St. Clair money in payment, could not affect the rights of the parties unless those instructions were communicated to Phillips before, or at the time of the delivery; that the case of a reward offered to the public for the apprehension of a criminal or the return of stolen goods, was analogous, and that any one might accept the proposition, perform the condition, and thus entitle himself to recover the amount of reward offered. So this court had held.

Judgment of the common pleas *affirmed*.

SLAVERY.

663

[Supreme Court of Ohio, Cuyahoga County.]

WILLIAM R. RICHARDSON v. HURON BEEBEE, SHERIFF, ETC.

Slavery—Constitutionality of the Ohio statute against kidnapping questioned.

Per WOOD, C. J. The sheriff has returned, in obedience to the writ of *habeas corpus*, issued in this case, that he took Richardson into custody on the 10th day of June, 1846, and now detains him in custody by virtue of a mittimus issued by John Barr, Esq., one of the justices of the peace in Cuyahoga county, and a certified copy of the mittimus is made a part of the sheriff's return.

The mittimus recites that "whereas, William R. Richardson, of the county aforesaid, has been arrested on the oath of James A. Briggs, for that, at the township of Cleveland, in said county, on or about the 30th of May, 1836, said William R. Richardson did knowingly aid in carrying one Alfred Berry, a black man, and a resident of said Cuyahoga county, of the state of Ohio, without taking said Alfred Berry before any judge or justice of the peace in said county, and without establishing his right of property in said Alfred Berry, agreeably to the laws of the United States, before any judge or justice in said county, and has been examined by me, John Barr, one of the justices," etc., "on such charge, and required to give bail in the sum of one thousand dollars," etc., "which he has failed to do: Therefore," etc. 664

The statute on which this prosecution is based, is the *second section of an act, entitled "An act to prevent kidnapping,"* found in Swan's Statutes, p. 600, which provides, "that no person or persons shall, in any manner, attempt to carry out of this state, or knowingly be aiding in carrying out of this state, any black or mulatto person, without first taking such black or mulatto person before some judge or justice of the peace, in the county where such black or mulatto person was taken, and there, agreeably to the laws of the United States, establish by proof his or their property in such black or mulatto person."

This section of the statute was designed to be applied exclusively to that unfortunate class of persons who owed service in one state, and escaped into another, and to those by whom they were arrested or seized. The constitution and laws of the United States recognize slavery, and protect the owner in the enjoyment of this species of property. This prosecution was set on foot, as shown by the mittimus, on the ground that Berry was a slave, and was seized and taken out of the state *without a right of property in him being first established*. In the case of the commonwealth of Pennsylvania and Prigg, the supreme court have decided, that the owner of a slave, either by himself, or agent, may pursue, arrest and return him to the state from whence he fled, without the aid of the state authority, and that *all state legislation which interferes with or embarrasses such arrest, is unconstitutional and void, and that all legislation on the subject is exclusively vested in congress*.

Every mittimus must, substantially, show the accused is charged with some definite offence, or it cannot be sustained. No man should be deprived of his liberty, unless his *caption and detention* are authorized by law. Upon the face of this mittimus, what has Richardson done? He

676 has arrested a slave, and taken him out of the state, *without proving his right before the state authority*, and this state legislation, in such a case, *is absolutely null and void*, under the decision of the supreme court of the United States.

It was said, on the hearing, that it did not appear but what Berry was a *freeman*, from the mittimus before the court, and that Richardson was therefore properly charged with kidnapping, under the first section of the act. It was, however, successfully answered, that it is not *averred* that Berry was a *freeman*, and the offence is charged to be the *not proving property before removal*. Unless property may, therefore, exist in a freeman, the mittimus itself shows that Berry was a slave, and the prosecution instituted on that ground. I am, therefore, of the opinion that the arrest and detention of Richardson are illegal, and direct him to be discharged.

BURCHARD, J., concurred.

1

PLEADING.

[Superior Court of Cincinnati, June Term, 1846.]

HAINES v. LYTLE.

Held, That the statute enabling a defendant to plead as many several matters as he may think necessary for his defence, confines him to such as the court in its discretion may deem essential to the justice of his cause; and the court will, on motion, strike pleas improperly filed from the record.

The statute of limitations is not a plea to the merits; a plea of the statute of limitations of fifteen years, is inapplicable to a declaration in assumpsit containing the common counts.

A set-off cannot be pleaded.

A plea *puis darrein continuance* operates as a waiver of all preceding pleas.

A special plea that merely amounts to the general issue, is bad, and will be stricken out on motion.

Matters of law, which may be given in evidence under the general issue, may also be pleaded specially.

ASSUMPSIT. The declaration contained the common money counts, and a count upon an account stated.

The defendant was in default for plea. On hearing the motion to set aside the default, and for leave to plead, a statement according to the rules of the court, of a meritorious defence was filed. Leave was given the defendant to plead. He immediately filed thirteen pleas—among them the statute of limitations of six years, the statute of limitations of fifteen years, set-off, release, satisfaction, and sundry other pleas, including non-assumpsit, and also a plea *puis darrein continuance*.

The plaintiff moved to strike out all these pleas except the general issue.

2 Messrs. Worthington and Haines, for Plaintiff; Messrs. Corry, Russell & Morris, for Defendant.

COFFIN, J. It has been urged that the 47th section of the Practice Act (Swan, 661), authorizes the defendant to file these pleas. Independent of any question arising upon the default of the defendant, what is the true construction of that provision of the Practice Act, enabling a defendant to plead as many several matters as he may think necessary for his defence?

The provisions of this statute and the statute of Anne are substantially the same. At common law, a defendant was permitted to plead one plea only, to the same part of the declaration. He might have had two or three substantial defences to an action, and yet could only bring forward one. The statute of Anne has enabled him in England, where he has more than one, to plead it with the permission of the court—thereby confining him to such as might be deemed, in the discretion of the court, essential to the justice of his cause. Such is and must be the construction of our statute. In England, leave is in form obtained to file several pleas; with us, leave is presumed, and the pleas are filed without application to the court. In England, the court will, in a proper case, rescind the leave granted. The case of *Gully v. Bishop of Exeter*, 5 Bing., 42, s. c., 15 E. C. L. Rep., 362, is directly in point. *Vide also Jenkins v. Edwards*, 5 T. Rep., 97. Our courts afford the same relief, on motion to strike the pleas from the record. Wilcox, 41.

1. As to the pleas of the statute of limitations.

The defendant was in default. He satisfied the court that he had a meritorious defence, and the court, therefore, gave him leave to plead. The leave was granted because the court deemed it essential to justice that he should be permitted to be heard upon the merits of the case. A plea to the merits is the only plea within the leave granted. The statute of limitations is a strict defence; it is not a plea to the merits, but excludes the merits; it does not come within the leave granted. 2 Wend., 294; 2 Harris & Gill, 79; 3 Harris & McH., 324. The supreme court (in 12 Ohio, 131), refused leave to file this plea, because it was not a defence to be favored, and could not, except under some peculiar circumstances, be deemed a meritorious defence. The plea of the statute of limitations of fifteen years, is inapplicable: there is no cause of action set forth in the declaration, to which it can relate. A plea in bar must be conformable to the count; it must be an appropriate answer to it. It is urged, in reference to this plea, that under this declaration the plaintiff may give in evidence a promissory note, which is a contract to which, under our statute, this plea, and not a plea of the statute of six years, would be applicable. If the plaintiff offers in evidence a promissory note, under the money counts, instead of declaring upon the same by a special count, the defendant, it seems to me, would not be precluded from setting up any defence of which he might have legally availed himself, had the declaration contained a count upon the note.

2. As to the pleas of set-off.

There is no right of set-off at common law. In general, a defendant has a right to retain or claim by way of deduction, all just allowances or demands accruing to him, or payments made by him, in respect to the same transaction which forms the ground of action; but this is not a set-off. That remedy is given exclusively by statute. The English statute allows it either to be pleaded, or notice to be given with the general issue. The mode in which our statute authorizes parties to avail themselves of it, is by plea of the general issue and notice. This mode must, therefore, be pursued. An offset cannot be pleaded. Wright's Rep., 595 and 743. So it has been held in New York, where the statute is similar to ours. 10 Johns. Rep., 399; 5 Cowen Rep., 231, 369.

The 12th plea is liable to the same objection. This is in truth a plea *pour arreter la continuance*. It is true, it does not assume that form; but it will be recollected that by a rule of this court, matters which arise after suit brought may be pleaded as arising since the commencement of the suit in

bar of the further prosecution thereof, without pursuing the form of pleas pleaded *puis darrein continuance*.

A plea *puis darrein continuance* operates as a waiver of all preceding pleas: if it prove insufficient, the defendant cannot resort to his former pleas. It was said in argument that this plea was filed in mistake. It may be withdrawn.

3. As to the other special pleas.

It is urged that they merely amount to the general issue. It is true that a special plea, which in effect amounts to the general issue, is bad; and it is said in Comyn's Digest, that it is better in such a case not to demur, but to pray the opinion of the court—that is, according to our practice, to move the court to set aside the plea. It is not true, however, that in every case where matter may be given in evidence under the general issue, a special plea, alleging such matter, will be bad; for there are many instances where the matter of defence may be pleaded specially as well as given in evidence under the general issue. The distinction laid down is, that mere matters of *fact*, which may be given in evidence 4 under the general issue, should not be pleaded specially, but matters of *law*, though they may be given in evidence under the general issue, may also be pleaded specially. Of this latter sort, are usury, infancy, release, discharge, accord and satisfaction, payment, etc. Story P. G. O., 131; Archibald, 177, 180.

In some instances it may be of importance to the defendant to present the defence by way of special plea; he is thereby advised of the reply of the plaintiff, and it may narrow the evidence to be adduced on the trial.

The late determinations in England are inapplicable; the rules of the pleading, R. H. 4, W. 4, 2, have entirely changed the law upon this subject.

Motion granted as to the pleas of the statute of limitations and set-off, including the 12th plea: overruled as to the others.

EXECUTION.

[Superior Court of Cincinnati, June Term, 1846.]

SMEAD V. DISS.

Motion to distribute money in hand of sheriff—Proceeds of sale of goods levied upon and sold by virtue of a fi. fa., issued on a judgment in this court in favor of plaintiff and against defendant.

Held, That where goods are once lawfully seized by a sheriff on a *fi. fa.*, they are in the custody of the law, and cannot be seized again by another officer.

At the January term, 1846, of this court, Smead & Collard recovered judgment against Diss for \$2,200 damages and costs. Two other judgments were rendered against defendant at the same term, one in favor of Fearing & Hall, and the other in favor of J. G. Barnett.

On the 14th of March, 1846, being the last day of the January term of the court, Smead & Collard sued out a *fi. fa.* on their judgment, and the same was on that day delivered to the sheriff, who on the same day 6 levied upon sundry goods of the defendants. These goods remained in the custody of the sheriff until the day of the sale, when they were

sold by the sheriff by virtue of this execution and levy, and the proceeds of sale, \$2,146.80, is the money in court.

On the 14th of March, 1846, but subsequent in point of time to the levy of the sheriff, a constable of Cincinnati township claimed to levy four several executions for \$200 each, issued by a justice of the peace of Cincinnati township, on judgments in favor of Smead and Collard against Diss, on the same goods subject to the levy of the sheriff, the goods then being in the custody of the sheriff; and the constable endorsed upon each execution by him held, that he had levied upon the same goods, subject to the sheriff.

On the 17th March, 1846, writs of *fi. fa.*, issued on the other two judgments against Diss, and were received by the sheriff on the same day, upon each of which writs he endorsed that he had levied upon the same goods, subject to the levy by the execution first above named.

On the 20th March, 1846, the sheriff received a *fi. fa.*, issued on a judgment in favor of Ellis & Vallette, against Diss, in the common pleas of Greene county, upon which he endorsed that he had levied upon the same goods, subject to the other writs of execution in his hands above mentioned.

Morris, Walker and Kebler, for Smead & Collard; *Spencer & Corwine*, for Barnett; *William Greene*, for Fearing & Hall; *Fessenden & Parkhurst*, for Ellis & Vallette.

COFFIN, J. Smead & Collard claim to postpone all the executions in the hands of the sheriff to the executions in the hands of the constable, let them be first satisfied, and then distribute the residue *pro rata* among the judgment creditors in this court. Smead & Collard might have abandoned the levy by their execution in the hands of the sheriff, and permitted the constable to take the goods. Had they done so, the constable would have seized the goods, made the sale, and the money arising therefrom would not have been here for distribution. They did not then, and do not now abandon the levy by the sheriff, but, upon some principle, which I confess I do not now exactly comprehend, are disposed to let go, if it be possible, their hold upon the goods, just enough to let in the executions in the hands of the constable, to be paid in full, and then close upon the goods again by virtue of the levy by the sheriff, so as to give them the full benefit of a levy by that officer. This, it seems to me, cannot be done.

It is admitted by all that this was a lawful seizure of the goods by the sheriff. What was its effect? It was a satisfaction of the judgment until legally disposed of. By the levy the possession of the goods was changed; by that act the goods were taken from the defendant and placed in the custody of the sheriff—the debtor lost his property in the goods—it vested in the sheriff. 3 Ohio, 223; 5 Ohio, 169; 4 Mass., 402; 12 S. & R., 41; 2 Bailey, 102; 1 W. C. C. Rep., 38; 4 Cowen, 417; 5 Yerger, 229; 1 Denio, 335; 17 J. Rep., 128.

While these goods were thus in the possession of the sheriff on a *fi. fa.*, the constable could not levy upon them; he could not seize them; he could not reduce them to possession, nor could he make the sheriff his bailee for them, or any part of them. Once lawfully seized, and in the custody of the law, they could not be seized again by another officer. *Backhurst v. Clinkard*, 1 Shower, 173; s. c. Holt, 643; *Farr v. Newman*, 4 J. Rep., 651; *Wilder v. Bailey*, 3 Mass., 289; *Hartwell v. Bissell*, 17 Johns., 128; *Hogan v. Lucas*, 10 Peters, 400; *vide* Noy's 28th maxim.

In the last cited case, the court say: "The marshal or sheriff, as the case may be, by a levy acquires a special property in the goods, and may maintain an action for them. But if the same goods may be taken in execution, at the same time, by the marshal and sheriff, does this special property vest in the one or the other, or both of them? No such case can exist; property once levied on, remains in the custody of the law, and it is not liable to be taken by another execution in the hands of a different officer."

The money is brought into court by the sheriff on the execution first received by him. It is here for distribution. The judgments before the justice of the peace are excluded. It is then admitted that the fourth section of the act regulating judgments and executions, distributes the money to the several judgment creditors in this court in proportion to the amount of their several demands; money so ordered to be distributed.

70

BILL OF EXCHANGE.

Superior Court of Cincinnati, June Term, 1846.

LAFAYETTE BANK OF CINCINNATI V. McLAUGHLIN.

Where a bill or note, payable at a bank, and not in the bank on the last day of grace, is presented for payment after usual banking hours, such presentation is at the risk of the holder; if no person is there to answer, it is not sufficient; if an answer be obtained, it is sufficient.

Where a note payable at a bank, is left there, and remains during banking hours on the last day of grace, and no funds are provided to take it up, it is sufficient evidence of demand and refusal of payment.

Notice of the dishonor of a note or bill, need not state that it had been presented at the place where payable, and payment demanded; nor is it necessary to state that the holder looks to the party notified for payment.

The notice ought, in express terms, or by necessary implication, to inform the party of the dishonor of the bill or note; that is all that is required.

Notice that the bill or note had been "protested for nonpayment," is sufficient.

Where a bill was protested at New Orleans, and the notices to the endorsers, including the defendant, were made out by the notary, and forwarded with the bill to the plaintiff in due time, and by due course of mail, who on the day of their receipt delivered to the defendant the notice of notary addressed to him: *Held*, That the notice by the notary was sufficient.

ASSUMPT. The plaintiff gave in evidence a promissory note, signed by J. and W. Mahard, payable to and endorsed by the defendant for \$10,000, at the Lafayette bank, and proved by a notary public that on the day the note became due, he as notary received the same of one of the officers of the Lafayette bank, in the banking house, just at the close of bank hours, and after the bank doors were closed; that he then demanded payment of the note, and received for answer from an officer of the bank, that there were no funds there to pay the note; he then

71 protested the same for nonpayment, and on the same day he gave to the defendant a written notice, stating that the note was by him protested for nonpayment that day. No other notice of demand or non-payment was given.

The plaintiff also gave in evidence a draft, drawn by the defendant at Cincinnati, on Mahard & Brother, New Orleans, for \$3,420, payable to the order of J. and W. Mahard, sixty days after date, endorsed by the

payees, and by the cashier of the plaintiff; also a certificate of a notary public, under his seal, of the presentation of said draft to the drawees on the day the same became due, the demand, refusal of payment, and the protest of the same. He also certified that on the same day he notified the drawer and all the endorser, of said protest of non-payment, by written notices enclosed in the one for the cashier of the plaintiff, directed to him at Cincinnati, and deposited the same in the postoffice in New Orleans in time to go by the first mail. The plaintiff proved by a witness that on the 2d of March, 1842, a package was received by the plaintiff, enclosing the draft and the protest of the notary, and the notices of the dishonor of the draft, one of which notices so enclosed was directed to the defendant; and on the same day the witness, by direction of the plaintiff, delivered to the defendant the notice so addressed to him; that the substance of the notice was, that the draft (describing the same) had been protested for non-payment. He further testified that the package was received in due time, and by due course of mail.

Chase & Ball, for the plaintiff, asked judgment for the amount due upon the note and draft.

Charles Fox, for the defendant, made several objections to a recovery upon the note and upon the draft. The points raised are severally noticed in the opinion of the court.

COFFIN, J. The first objection to a recovery upon the promissory note is, that no legal demand of payment was made; that the presentation at the bank where payable, was not seasonable; and it is contended that a bill or note, payable at a bank, must be presented during banking hours; that a presentment out of banking hours is not sufficient.

I agree that there are expressions in many of the books, sustaining this position; but they are not to be taken without qualification.

I take the rule to be, that if the bill or note is not in the bank on the last day of grace, and the presentment is made after the usual banking hours, it is at the risk of the person presenting it; for if no person is there to respond, it is not sufficient; but, if the presentation is in fact made, and an answer given to the demand, the object of the presentation is completed, and it is sufficient. 72

I am aware that in the case of the *Bank of Utica v. Smith*, 18 J. Rep., 230, the presentation of a note after the close of the bank for ordinary business, was held good by that distinguished court for a different reason. That was an action against the payee and endorser of a promissory note, payable at the Mechanics' bank, New York. The note was presented at that bank at about fifteen minutes after three o'clock P. M., and payment demanded; and it was answered that the note could not be paid for want of funds of the makers. The officers of the bank were present. That was the usual hour to call for notes, though the bank closed at 3 o'clock P. M. The court held that the note was properly presented at the bank for payment, for the reason that, although it was a quarter of an hour after the usual time for closing the bank as to other business, it was yet within bank hours for that purpose, according to the general course of business at that bank; and of the course of doing business there the defendant ought to have informed himself. The learned judge, who delivered the opinion of the court, cites *Parker v. Gordon*, 7 East., 385, and *Elford v. Teed*, 1 M. & S., 28, both tried before Lord Ellenborough, and *Haynes v. Birks*, 3 B. & P., 599.

In *Garnett v. Woodcock*, 1 Starkie, 475, s. c. 2, E. C. L. Rep., 473, s. c., again reported in 6 M. & S., 44, the bill was payable at a banker's; it was

presented after banking hours; the clerks were gone, but a servant was stationed there, who returned for answer "no orders." On the trial before Lord Ellenborough, it was objected that this was not a sufficient presentment; and the cases of *Parker v. Gordon*, 7 East., 385, *Elford v. Teed*, 1 M. & S., 28, were cited; but the objection was overruled, and the plaintiff had a verdict. In the ensuing term, the defendant moved to set it aside, on the ground that a presentment out of bank hours was irregular; but the court held the presentment sufficient, because an answer was given.

Henry v. Lee, 2 Chitty, 124, s. c., 18 E. C. L., 273, was an action by the endorsee of a bill drawn and endorsed by the defendant, and accepted, payable at a banker's. One of the reasons urged for a new trial was, that the bill was presented after usual hours. To this Lord Ellenborough, C. J., says: "It is not in general sufficient, and will not do if no person is there to receive it; but, if somebody is there, and the person presenting the bill gets an answer, which I understand was the case here, it is sufficient." And BAYLEY, J.: "If it is presented after the usual hours, 73 it is at the peril of the person presenting it; for if nobody is there, it will not do; but if there is, then it is immaterial at what time it was presented."

Flint v. Rogers, 3 Shepley (15 Maine), 67, was assumpsit against the drawer and endorser of a draft, payable at a Kenduskeag bank, Bangor. The plaintiff proved, by Rice, a notary public, that the draft was handed to him by the cashier of the Mercantile bank, in the afternoon of the last day of grace, after regular banking hours; that he immediately called at the Kenduskeag bank for payment, which was refused, the officer replying that there were no funds to pay the draft. The notary then protested it for non-payment. It was objected, that no legal demand was made, not having been made at the bank in banking hours. After argument and advisement, the court held, that as the officer whose duty it was to attend to that business, remained there, and returned a negative answer, and as no funds were provided to pay the draft, the demand was sufficient.

The note in this case was handed to the notary by an officer of the Lafayette bank, in the banking house, just at the close of bank hours. The note belonged to the Lafayette bank, and it was then in bank, and payable there. Would it be a violent presumption for a jury to find that it was in the bank, and had been there, at least that day, during banking hours? *Berkshire Bank v. Jones*, 6 Mass., 524.

On the day when the note, in the case of the *United States Bank v. Carneal*, 2 Peters, 548, became due, it was in the bank, the bank being the holder thereof, and it being payable there. After the usual banking hours were over, it was delivered to a notary by the officers of the bank for protest, they informing him at the same time that there were no funds there for the payment of the note. "We are all of opinion," say the court, "that this was sufficient proof of a due demand of payment."

It is a sufficient evidence of demand of payment and refusal to pay a note at a particular place, if the note be left there, and no funds are provided to take it up. 7 Wend., 160; 13 Mass., 558; 2 H. Bl., 510; 2 Hall, 112.

The next objection is to the notice to the defendant, and applies as well to the notice of the dishonor of the draft as of the note. It is claimed that the notice is not sufficient, because it does not state that the

note or draft was presented at the place where payable, and payment demanded.

It has been uniformly determined, that no particular form of words is necessary in the notice; and it has been held, that though the notice be irregular, or even vary in some particulars from the true state of the facts, yet, if it do not mislead, and be sufficient to put the party on enquiry, it is good. 5 Howard (Mass.), 555; 12 Mass., 6; 1 Pick., 401; 8 Metcalf, 498; 2 Hill, 593; 2 Johns. Cases, 337.

I think the true rule to be, that the notice ought in express terms, or by necessary implication, to advise the party that the bill or note had been dishonored. A notice from a notary that a bill (describing it) had been by him protested for nonpayment, is within that rule.

In *Mills v. United States Bank*, 11 Wheat., 431, the language used in the notice was, that the note "has been protested for nonpayment," etc. STORY, J., says: "The last objection to the notice is, that it does not state that payment was demanded at the bank when the note became due. It is certainly not necessary that the notice should contain such a formal allegation. It is sufficient that it states the fact of nonpayment of the note, and that the holder looks to the endorser for indemnity."

In *Smith v. Little*, 10 N. H. Rep., 526, which was an action against the endorser of a note, the notice to the defendant, after describing the note, adds, "due this day, the last day of grace, is protested for nonpayment." One of the objections to the recovery was, that the notice "did not state that any demand had been made." PARKER, C. J.: "We are of opinion that the notice is sufficiently specific; it states that it has been protested for nonpayment, from which the defendant must have understood that a demand had been made, so far as the holder supposed a demand was necessary, and that the note had not been paid."

Crocker v. Getchell, 10 Shepley (22 Maine), 397, was an action by endorsee against endorser of a promissory note. The notice stated the note "became due this day, and is protested for nonpayment." It was contended that this notice was not sufficient, because it did not state that a demand had been made upon the makers; but the court recognized the doctrine of the supreme court in *Mills v. United States Bank*, and held the notice in this particular sufficient.

Again, it is objected to these notices, that they did not tell the defendant in express terms, that the plaintiff looked to him for payment. This objection is not without the show of authority. In *Tindal v. Brown*, 1 T. R., 67, BUTLER, J., says, that, to render the endorsee liable, you "must show that the holder looked to him for payment, and gave him notice that he did so;" and in *Solarte v. Palmer*, 7 Bing., 520, s. c. 20, E. C. L., 226, TINDAL, C. J., says, "that the notice should at least inform the party to whom it is addressed, either in express terms or by necessary implication, that the bill has been dishonored, and that the holder looks to him for payment of the amount."

In *Mills v. United States Bank*, Judge STORY says, what has already been quoted: "It is sufficient that it (the notice) states the fact of nonpayment, and that the holder looks to the endorser for indemnity;" and in *Shed v. Brett*, 1 Pick., 401, C. J. PARKER says: "The great object of the notice is to put the party affected on his guard; and if he is informed of the two principal facts, that the note is dishonored, and that the holder looks to him for payment, he may easily acquire all other knowledge necessary for his safety."

Perhaps there are other cases where similar expressions are to be found; and yet I am satisfied that the objection ought not to be sustained. Notice of the dishonor of the bill or note is all that is required: that will, in the language of C. J. PARKER, put the party affected on his guard; and it is a sufficient indication that the endorser will be looked to for indemnity.

Upon seasonable notice of the dishonor of the bill, the endorser becomes responsible, and that notice will enure to the benefit of every other party who stands between the party giving the notice and the endorser. Suppose a party to avail himself of another's notice, is *he* called upon to prove on the trial that *he* looked to the defendant for payment of the bill, and in the language of Buller, "gave him notice that he did so?"

In *Cowles v. Harte*, 3 Conn., 517, the Judge who tried the cause, charged, that the endorsers must be notified of the nonpayment of the bill, "and that the holders look to them for payment;" but the supreme court decided that the charge could not be supported; that the notice need not state that the holder looks to the party notified for payment, that being implied in the act of giving notice.

In the *United States Bank v. Carneal*, 2 Peters, 552, the court say: "A suggestion has been made at the bar, that the letter to the endorser, stating the demand and dishonor of the note, is not sufficient, unless the party sending it also inform the endorser that he is looked to for payment. But when such notice is sent by the holder, or by his order, it necessarily implies such a responsibility over. For what other purpose could it be sent? We know of no rule that requires any formal declaration to be made to this effect."

In *Furze v. Sherwood*, 2 Adolph & Ellis, N. S., 409, s. c., 42 E. C. L., 376, it was held that the notice need not state that the holder looked to the party for payment. In this case, Lord DENMAN says: "In no case has the absence of such information been held to vitiate a notice in other respects complete, and which had come directly from the holder."

In *King v. Bickley*, 2 Adolph & Ellis, N. S., 419, s. c., 42, E. C. L., 740, it was objected, that "the notice did not tell the defendant that the plaintiff looked to him for payment." At the trial before WIGHTMAN, J., the objection was overruled, and verdict for plaintiff, with leave to enter a verdict for defendant, if the court should consider the notice to have been insufficient. On the hearing of that motion, the remarks of Buller in *Tindal v. Brown*, already quoted, were read, to which Lord DENMAN remarks: "That dictum was not necessary to the decision, nor was it adopted by Lord MANSFIELD." The remarks of C. J. TINDAL in *Solarte v. Palmer*, already quoted, were also cited, to which Lord DENMAN says: "In the house of lords, PARKE, J., in declaring the opinion of the judges present when that case came on in error, said, that 'such a notice ought, in express terms, or by necessary implication, to convey full information that the bill had been dishonored.' 1 Bingham, n. c., 194, s. c., 27, E. C. L., 351. He dropped that particular expression in the judgment below on which you rely." Subsequently the opinion of the court was delivered by Lord DENMAN: "On the point in this case as to notice of dishonor, we have conferred with the other judges, and are of opinion that it is not necessary, in express terms, to inform the party whom it is intended to charge, that he will be looked to for payment. We think that the sending notice of dishonor is in itself sufficient for that purpose."

In *Ranson v. Marsh*, 2 Hill, 593, the court say: "Indeed, it does not seem necessary to inform the drawer or endorser that he is looked to for payment; for he can understand nothing less than that from the fact that the holder gives him notice that the paper has been dishonored."

In *Shrieve v. Duskham*, 1 Littell Rep., 194, it was held that the notice need not state who is the holder of the bill, nor to whom the holder intends to resort for payment.

In *Miers v. Brown*, 11 Meeson & Welsby, 372, reference is made to the case of *Furze v. Sherwood*, already cited, and the same point affirmed.

The last objection is, that the notice of the dishonor of the bill from the notary at New Orleans, through the bank here, is not sufficient to charge the defendant. I think the testimony justifies the finding that there was no delay; and it was not necessary for the plaintiff to give notice to the defendant instead of sending the notice made out by the notary for the defendant. The notice by the notary was sufficient. 10 Shepley (22 Maine), 292; 18 Johns. Rep., 230; 1 Marsh, 454; 1 Littell, 194; 3 Wend., 173. 77

Judgment for Plaintiff.

WATER CRAFT.

123

[Court of Common Pleas for Lucas County, Ohio, July Term, 1846.]

DECASE M. GOODSSELL V. THE BRIG ST. LOUIS.

[Reported by CHAS. W. HILL.]

An action against a water craft, by name, cannot be sustained in this state, on an indebtedness contracted in another state.

It is wholly immaterial, in such case, whether there is or not, a liability to such action in the state where the indebtedness accrued.

This was an action of Assumpsit. The declaration set forth a liability according to the facts. The plaintiff proved the expenditure of a large amount, in labor and materials, in repairing and refitting the brig, at Detroit, in the state of Michigan, under the direction of the then master of the brig. That before and after the repairs, she had navigated the lakes, running from Buffalo to ports in Ohio, Michigan, and elsewhere.

The plaintiff also gave in evidence the statute of Michigan, containing the following among other provisions:

"Sec. 1. That every boat or vessel used in navigating the waters of this state shall be liable—

"*First.* For all debts contracted by the master, owner, agent or consignee thereof, on account of supplies furnished for the use of such boat or vessel; on account of work done, or services rendered on board such boat or vessel; on account of labor done or materials furnished by mechanics, tradesmen, or others in and for the building, repairing, fitting out, furnishing or equipping such boat or vessel.

"Sec. 2. Any person having a demand as aforesaid, instead of proceeding for the recovery thereof against the master, owner, or consignee, of a boat or vessel, may at his option, institute suit against such boat or vessel by name.

"Sec. 3. Any plaintiff wishing to institute suit against a boat or vessel, shall file his complaint against such boat or vessel by name with the clerk of the circuit court of the county in which such boat or vessel may be."

And the plaintiff having rested his cause, the counsel for the defence moved that the plaintiff become nonsuit.

Hill & Bennett, for Plaintiff.

McBain & Potter, for Defendant.

By the court—TILDEN, P. J.

124 This is an action of Assumpsit for materials and repairs furnished at Detroit in Michigan. It is shown that these were furnished at the request of the then master of the vessel; and that there are statutory remedies in Michigan, authorizing in such case, an attachment of the vessel by name; and the question referred to the court, is, whether the present action can be sustained. And the decision of this question will depend upon the construction of the water craft law of the 26th February, 1840.

It is obvious that the interpretation of this act, can, in no manner, be controlled by the local laws of the place of the contract. If these laws are part of the *lex fori*, it is very plain they can have no operation here. For the law of the remedy is strictly local, and each jurisdiction prescribes the rules of its own judicature. If these laws are a part of the contract, the right which they confer upon the parties to the contract, will be considered and enforced by every tribunal called to adjudicate upon the contract. But the law of the remedy will be the law of the place where the remedy is sought, and will be altogether independent of the foreign law, which the parties have adopted into their contract. The act of 1840 is an act to provide "for the collection of claims against steamboats and other water crafts, and authorizing proceedings against the same by name." Swan's Statute, 209. It contains no provision for the trial of the right of property in, or the enforcement of special liens upon "steamboats or other water crafts." Therefore the law of the remedy, for the enforcement of such rights, as well in cases where they are created by a foreign law, which is considered a part of the contract as in cases where they are created by the special provisions of the contract itself, consists in the ordinary common law, or equity powers of the court. A mortgage upon a vessel, made in New York, if sought to be enforced here, would be enforced by an action of replevin, or trover, or by a suit in chancery, and no one would think of resorting to the statutory remedy in question. And a lien created by a law where the transaction occurs, would be enforceable here only by a similar remedy. We shall consider the plaintiff's case, then, simply as a "claim against a water craft," and proceed to inquire whether, as it was contracted out of the state, the remedy for its collection here, is given in the "water craft law;" or consists in a proceeding by foreign attachment, or other personal action.

125 The provisions which give this remedy are contained in the first, second and third sections of the act. These provisions are: "that steamboats and other water crafts, *navigating the waters within and bordering upon this state*, shall be liable for debts contracted on account thereof; for damages arising out of any contract for the transportation of goods or persons; for injuries done to persons or property by such craft; or for an injury done by the captain, mate or other officers, or by

any other person, under the order or sanction of either of them, to any passenger or hand, at the time of the infliction of such injury." *Sec. 1.*

"Any person having such demand, may proceed against the owner or owners or master of such craft, or against the craft itself." *Sec. 2.*

"When suit shall be commenced against the craft, the plaintiff shall file his præcipe to that effect, and with it a bill of particulars of his demand," etc. *Sec. 3.*

There is nothing in these provisions or elsewhere in the act, showing an intention to give to them an extra territorial operation; or rather to comprehend foreign transactions, when made the subject of adjudication in our own courts. The expression, "*any person having such demand*," should be construed to mean "*any person*" who has a demand which is included in the first section of the act, and the phrase in the first section which defines "such demands," that water crafts shall be liable upon contracts and for torts, in its literal sense, means no more than that such water craft shall be liable for contracts made and torts committed whilst "such water crafts" are "navigating the waters within or bordering upon this state." Torts committed and contracts made out of the state are not within the letter of the statute; and in our opinion there are decisive reasons for holding that they are not within the spirit and meaning of it.

If it could be shown, as we think it can be, that the provision which creates a "liability upon contracts," is one which belongs to the law of the contract, its operation would, of course, be local; for the interpretation and obligation of such engagements is controlled by the *lex loci contractus*. Story on the Conflict of Laws, section 322. *Whister v. Stoddard*, 8 *Martin's R.* 95, 134, 135.

"The obligation of a contract consists in its binding force upon the party who made it; this depends upon the laws in existence *where it is made*; these are necessarily referred to in all contracts and form a part of them, as the measure of the obligation to perform them by the one party, and the right acquired by the other. There can be no other standard by which to ascertain the extent of either, than that which the terms of the contract indicate, according to their settled legal meaning; when it becomes consummated the law defines the duty and the right, compels one party to perform the thing contracted for, and gives the other a right to enforce the performance by the remedies *then in force*. These laws giving those rights and furnishing those remedies, are as perfectly binding, and as much a part of the contract, as if they had been set forth in its stipulation in the very words of the law." *Benson v. Kenzie* 1, Howard's R., 311. *McCracken v. Howard*, 1 West. L. J., 349. A contract for supplies, made by the master or owner of a steamboat or other water-craft, is a contract that such "water-craft shall be liable upon the contract made on account thereof," and it confers upon "any person having such demand" an inviolable right to "proceed against the craft itself," and to collect his debt by an unconditional sale of the entire ownership of the craft, discharged of all prior claims. Such is the nature and extent of the obligation and the right as indicated by the provisions of the law, considered as a part of the stipulations of the contract: and these provisions can form no part of any contract not entered into within the jurisdiction of the state in which there is such a law.

But there is another view which may be taken of this statute, equally conclusive against the title of the plaintiff to sue under it. It has been

decided by the supreme court (11 O. R., 462), that it was the intention of the legislature to treat "the boat as a person, capable of contracting debts, and of becoming liable for money demands, and to substitute the boat for the owners, and treat her, for the purpose of the suit, as a person, and to sell her out to satisfy the judgment which might be recovered." 12 O. R., 342. Now all questions of capacity depend upon the law of the place where the contract is made, or the act done. Story's Conf. Laws, section 103. If the party would be capable of binding himself by the law of the place where the remedy is sought, still he cannot be bound unless he had capacity to bind himself by the law of the place of the contract or act. For example, by our law a female is of full age for all purposes at eighteen; yet if an action should be brought in our courts against a female under twenty-one, upon a contract made in New York, it would not be enforced, for the age of majority by the law of New York is twenty-one. It will be no answer to this position to say that the laws of Michigan afford an attachment against the vessel; and for the reason already stated, and for another one, that the right to an attachment under the Michigan law is a right to an attachment *in the Michigan courts*, and in the cases pointed out in that law. In other words, that law belongs to 127 the *lex fori*: it gives a remedy against the boat in certain cases, but does not confer, and is not construed by the local courts to confer, any peculiar attributes or capacities upon the boat itself.

If there remain any doubt as to the true import of the act of 1840, it may not be useless to advert to the circumstances under which it was passed, to the old law, the mischief and the remedy. Before the passage of this law, the collection of debts against a boat or vessel could only be enforced by the imperfect remedy of a foreign attachment, or by a common law action. On the north we are bounded by a chain of lakes, and on the south by navigable rivers, navigated by boats and vessels from some thirteen different states and provinces. The mischief was the difficulty of collecting debts due from the owners of boats, for articles furnished for their use, and for recovery of damages sustained to persons or property by boats, and by the conduct of the crew. 11 O. R., 460. But this was a mischief felt only by our own citizens, and this alone, it was the province and design of the legislature to remove. In most if not all the neighboring states there were statutory remedies in all such cases; but these were local, and for the most part, if not universally, applicable to domestic transactions. So that while our vessels and boats were subjected to these summary proceedings abroad, our law furnished no such remedy in favor of our own citizens against transient vessels for obligations incurred by them within our own jurisdiction, and we were driven to a personal action; or compelled to go abroad for a better remedy, if a better remedy existed abroad. These were the circumstances under which the statute was passed, and this was the real mischief against which it was deemed proper to provide; and such as we have here defined it, is, in our judgment, the limit within which the remedy was intended to be confined.

It is not impossible that a different view may be taken of this question by the supreme court. It is desirable that the law should be promulgated in an authentic form; and the profession will not be opposed to a decision which will so augment the business of our courts. But the opinions which we have formed compel us to hold that this action cannot be sustained.

Nonsuit granted.

FORCIBLE DETAINER.

128

[Wyandot County Court of Common Pleas, October Term, 1846.]

CHESTER R. MOTT, PLAINTIFF IN ERROR, v. GEORGE LARICK, DEFENDANT IN ERROR.

[Reported by I. D. SEARS.]

The purchaser from the United States of a lot in the town of Upper Sandusky, and a log house adjoining, but situated wholly in the street, may maintain forcible detainer against an occupant of the house who has no color of title.

Such occupant cannot question the validity of the purchaser's title.

CERTIORARI TO THE JUDGMENT OF A JUSTICE OF THE PEACE.

The action below was *forcible detainer* tried before a justice of the peace and jury, on the 31st January, 1846. It was brought to recover possession of "*the log house in Walker street adjoining, and sold with in-lot, No. 218, in Upper Sandusky.*" Larick purchased the property in question at a public sale of the Wyandot lands, held at Upper Sandusky, on the 22d of September, 1845, under a law of congress. The log house, which stood in the street, was appraised by the register and receiver at \$50, and attached to and sold with lot No. 218, which adjoins the street in which the house is situated. No part of the house stood on the lot. Mott was in possession of the house at the time of the sale, and had been for some time before. The commissioner of the general land office instructed, in writing, the register and receiver, that, in making sale of improvements situated wholly in a *street*, they might sell the same at auction for what they might deem a fair value, specifying that they must be removed when required by the municipal authorities of the town. Where only a *part* of an improvement was in a street, he directed that the whole should be sold with the lot on which the *balance* was situated, with the understanding that that part on the street would be subject to the municipal authorities of the town. The buildings and other improvements, on the plat of Upper Sandusky, were appraised by the register and receiver before they were offered for sale; and these officers considered that they had no other authority to make sale of said house in that manner except said written instructions.

On the above state of facts being proved, Mott asked the justice to nonsuit the plaintiff, which was refused. He then asked the justice to charge the jury that they might enquire whether the acts of the land officers were sufficient to pass the title to the plaintiff, Larick. 129 The justice instructed the jury that a state court could not lawfully inquire into the legality of the acts of the land officers to pass the title as aforesaid; that the defendant, Mott, could not question the authority of the officers to make the sale.

A verdict of *guilty* was returned by the jury, on which the justice gave judgment.

The following errors were assigned:

1. The action will not lie, because the house was situated in a public street.
2. Forcible detainer is not the proper remedy, because the defendant was in possession at the time of the plaintiff's purchase.
3. The justice erred in admitting the testimony—in not granting a nonsuit—in his charge to the jury and in rendering the judgment.

4. The jury erred in finding a verdict of guilty.

Mr. Godman, for plaintiff in error.

To show in what cases forcible entry and detainer, and also ejectment will lie, cited Stat. 417, 8 O. R., 398; 1 Bouv. Law Dic., title Eject.

2. He contended that the house was personal, and not *real* property, and that this action would not lie, but the remedy should be *trover* or *replevin*. 1 Chip., 531; 1 C. & P., 123; 10 Pick., 138; 2 Yates, 331; 16 Wend., 531; 4 Mass. R., 514; 8 Pick., 402, 283; 5 *Id.*, 487; 6 N. H., 555; 6 Greenleaf, 452; 1 Hill Rep., 176; 1 Fairf., 871; 3 *Id.*, 162; 2 Wend., C. C., 33.

3. He argued that the justice "committed a most palpable error in deciding that the state courts had no right to inquire into the legality of the purchase of the house by Larick."

Mr. Sears, for defendant in error.

1. There existed in the government, notwithstanding the laying out of the town into streets, lots, and alleys, a qualified or transient interest, sufficient to support this action, and that this interest was by the sale transferred to Larick, and that, as the *legal* right of possession is drawn in controversy, it is immaterial how minute or transient this right may be. 1 Black. R., 27; *Id.*, 134.

2. The town of Upper Sandusky was laid out pursuant to an act of congress, and not according to the regulations prescribed by the Ohio Statute, 987, wherefore the rights of individuals must be determined
130 by the rules of the common law.

3. After the sale of town lots, the *fee* of the streets remains in the vender. 2 Hill Abr. c., 7 s., 27; 2 Wend., 472, 20 *Id.*, 96.

4. The charge of the justice was a rather bungling enunciation of the principle decided in 6 Cranch, 138; 7 *Id.*, 279; 2 Wheat., 1.

Mr. Godman in reply.

Dedications of land for public purposes, enure as grants, and are valid without any specific grantee in *esse*, to whom the fee could be conveyed. 3 Kent Com., 450; 6 O. R., 303; 9 Cranch, 292; 6 Peter R., 431; 4 Paige, 410; 10 Peters R., 662; 1 Hill N. Y. R., 191.

Real estate is something permanent as to place, and perpetual as to duration. 1 Swift 73; 1 Hill Abr., 3. No real action will lie for a house erected in a public highway. 1 Hill Abr., 5; Por., 21; 9 O. R., 165.

BOWEN, J. The Wyandot nation of Indians concluded a treaty with the government of the United States on the 17th March, 1842, by which there was ceded to the latter a tract of land in the then county of Crawford, containing about one hundred and nine thousand acres. The land was, at the date of the treaty, occupied by Indians; and various improvements, such as buildings, fences, clearings, etc., had been made by them, which the United States stipulated should be paid for according to the valuation of two men to be chosen by the president. The Indians were allowed to occupy their lands till April, 1844, with the privilege to the United States of surveying and selling the land at any time before the 1st of April, 1844. On the 3d of March, 1843, an act of congress was approved, providing for the sale of these lands. It enacted that a portion of the tract, including the town of Upper Sandusky, not exceeding in quantity 640 acres, should be laid off under the direction of the surveyor general, into "town lots, streets, and avenues, and into out lots." It then provided that the said public land, with the exception of section 16, should be offered at public sale, at Upper Sandusky, under the super-

intendence of the register of the land office, and the receiver of public moneys for the district, at such time as the president by his proclamation might designate. And if, in offering any tract on which improvements existed, the valuation of the same was not bidden, it was made the duty of the register and receiver to withdraw the tract from sale, to be again offered upon notice being given, etc. By another act of congress, approved February 26, 1845, one-third of the in and out-lots of the town of Upper Sandusky, were given to the county of Wyandot. 131

In surveying off the town of Upper Sandusky into "lots, streets, and avenues," some buildings, which were then, and for a time before had been occupied by the inhabitants, were found to be situated exclusively within some of the streets. The same was also the case with other improvements than buildings, which had been made by the Indians. Although these improvements had been appraised by the agents of the United States, and the value of them according to the treaty was to be paid to the Indians, and although the government expected to derive from the purchasers of these lands the appraised value of all the improvements, no provision was made by law as to the mode of selling them. Such a case was probably not contemplated when the law was framed, else we might have expected some provision would have been made for it.

Under these circumstances, the register and receiver offered the house at public sale, as the property of the United States; and it was purchased by Larick at its appraised value, and he received a title in the usual form. Mott at the time held without any color of title, and the record does not show that he had at any time a right of possession. This action was prosecuted to obtain the possession which it was claimed was wrongfully detained by Mott.

The counsel for plaintiff in error has rightfully denominated this an action to recover *possession*. It is so manifestly, and does not decide the title between the parties. By the statute, it lies against those who have a lawful and peaceable entry into lands or tenements, and by force hold the same.

The United States had, I apprehend, at the time of the sale to Larick, a right to an action of ejectment, or of forcible detainer against Mott, and were, upon the facts shown in the record, clearly entitled to recover. For, admitting that the street had been already dedicated as a public highway, they owned the lots situated thereon, and the fee of the street, subject to the public easement. They might therefore maintain ejectment for the house in question, and for so much land as was occupied by it, subject to the right of way in the public. This point is expressly decided in the case of *Goodtitle v. Alkers, et al.*, 1 Bur. R., 133. The right which the United States had in the house was transferred to Larick, and with it most certainly a right to occupy it, subject to the conditions of the sale. The right of action in such cases, passes with the transfer of title.

But it is claimed that the justice erred when he instructed the jury that they could not inquire into the legality of the acts of the land officers in passing the title. If this were received as a naked proposition, it would be pronounced an erroneous opinion. It must, however, be considered in connection with the facts proved on the trial; it would not be intelligible without. The record shows that no claim of title to the property was offered by Mott. He did not pretend that the United States had ever conveyed the house to any other person. There is no dissent expressed by the United States to the sale made by the register and re-

ceiver. They are understood by the record as giving their sanction to Larick's title. The officers have conveyed it according to their understanding of the law. No one but the United States, or some grantee under them, can oppose or call in question the title of Larick. The instruction of the justice must then be understood as meaning that the sale of the United States could not be drawn in question by third persons—by strangers, claiming no title in the premises; and this we think was a correct view of the subject.

This case is decided on its own peculiar merits. It is not like the case of a house sold to an individual, by one having no interest in the sale. In such cases, it is conceded that trover or replevin would be the appropriate action. But, in all cases where an individual is the owner of the fee of the land encumbered by a public highway, he may maintain trespass or ejectment against a wrong doer, at any time during the continuance of his estate so encumbered.

The judgment is affirmed.

LIMITATIONS OF ACTIONS.

[Supreme Court of Ohio, Morgan County, November Term, 1846.]

OHIO, FOR USE OF B. & S., v. FOUTS ET AL.

The statute of limitations of one year is a bar to all actions against a sheriff for malfeasance in office; and where the action is in form debt, and founded upon the official bond, if the breach relied upon is in fact a malfeasance in office, the statute of one year applies.

ERROR to the common pleas. It was an action on the official bond of a sheriff, dated in 1833.

The breach alleged is, that the sheriff, having in his hands an execution against one Stones, in favor of B. & S., levied upon certain personal chattels, which he left in Stones' possession, by means whereof they were lost and squandered, and the debt of the said B. & S. thereby lost.

Plea—action did not accrue within one year—general demurrer, which was overruled in the common pleas.

BIRCHARD, J., delivered the opinion of the court—holding that the true construction of the statute of limitations would sustain the plea. The third clause of the first section of the statute, bars debt upon a specialty in fifteen years; the sixth clause of the same section bars actions against officers for malfeasance in office in one year. This action in form, is debt, and in favor of the state of Ohio; but in substance, it is against a sheriff for malfeasance in office, and in favor of B. & S. It is to be noticed, that this part of the sixth clause specifies no *form* of action, and in this particular departs from the other provisions of the same statute, each of which enumerates a distinct form of action, and bars it *eo nomine*. The learned judge therefore thought that the court were at liberty to apply the bar of one year to all actions against a sheriff, which were substantially for malfeasance in office, without regard to the form of the action.

The office of sheriff under our constitution, is limited to two years; and it would not seem consistent with justice, if a sheriff should be called upon thirteen or fourteen years after the expiration of his term of office, to account for alleged acts of malfeasance.

Judgment affirmed.

EVIDENCE.

279

[Superior Court of Cincinnati, October Term, 1846.]

ROBERT LEWIS V. NUGEN & CONN.

In replevin, by the vendee, for the goods levied upon as property of the vendor, for his debt, the vendor is a competent witness for the plaintiff to support plaintiff's title.*

REPLEVIN. On the 19th of February, 1845, Nugen recovered several judgments against John Lewis and another, before a justice of the peace, on which executions issued, and the property in question seized as the property of John Lewis. The plaintiff claimed the property 280 by purchase from John Lewis some few days before the seizure, and offered the depositions of John Lewis to support his title to the same.

Mr. Strait, for the defendant, objected. John Lewis is the plaintiff's vendor; he is interested to support the sale; if the plaintiff is defeated, the witness is liable to the plaintiff for the value of the goods sold, and also for the costs of this suit.

*The execution defendant, on a trial of a right of property between the claimant and the execution plaintiff, is a competent witness for the claimant. *Hawkins v. Ingols*, 4 Blackf., 35; *Kendall v. Hall*, 6 Blackf., 507.

As to the execution debtor being a competent witness for the plaintiff in execution, *vide Bland v. Ansley*, 2 New Rep., 331.

Where the property contested in an action will go, in the event of the plaintiff's prevailing, to lessen a debt due to him from one offered as a witness, and, in contrary event, the witness will receive the value of the property in money, he is a competent witness for the plaintiff. *Rice v. Austin*, 17 Mass., 197.

Where a witness is in every event liable, and his testimony is to determine to which of the parties he is liable, he is a competent witness for either of them. *Emerson v. The P. H. M. Co.*, 12 Mass., 237; *Harwood v. Murphy*, 4 Halst., 215.

Where a debtor assigned property to a creditor in payment of a debt, with a covenant of general warranty, and the same property was attached by another creditor, in an action between the assignee and the attaching creditor, the debtor was offered as a witness to support the title of the assignee; it was objected that he was interested in the event of the suit; for if the defendant prevailed, he would be liable to the plaintiff on his warranty, and also for the costs of this suit, so that his interest was not balanced; but the court held the witness competent. *Prince v. Shepard*, 9 Pick., 176; *vide* 4 J. Rep., 126; 13 Mass., 199; 4 Port., 63; also 1 Greenlf. Ev., § 391, 399, 420.

In *Eldridge v. Wadleigh*, 3 Fairfield (12 Maine), 371, it was held that, though as a general rule, a vendor cannot be called as a witness for the vendee, to sustain his title, when that title is called in question, yet he may be thus called, in cases where his interest is balanced— as where goods are attached as the property of the witness, and replevied by his vendee. If the vendee prevails, the warranty, actual or implied, is satisfied; if the creditor prevails, the value of the goods is applied to the payment of the witness's debt. Whether a vendor would or would not be liable to his vendee for costs incurred in defending the title, as well as for the value of the goods, on receiving notice of the suit, and being called upon to take upon himself the defence of it, he would not be liable for costs without such notice.

Where the question is, whether the vendee of personal property shall hold it, or whether it shall be subject to the attachment or seizure of a creditor of the vendor, upon the ground that the sale was fraudulent, the interest of the debtor or vendor is balanced, and he is a competent witness for the vendee or his assignee. *Cutler v. Copeland*, 6 Shepley (18 Maine), 127.

In *Danforth v. Roberts*, 7 Shepley (20 Maine), 307, it was held that, although where the result will determine only which creditor of the witness will be paid, he is competent; yet where, if the party calling him shall prevail, his debt to his creditor will be paid; but if the opposing party prevail, the debt to the creditor will remain unpaid, and the witness will have a claim to the same amount against an insolvent man, the interest is not balanced, and he will not be a competent witness.

Mr. Telford, contra, claimed that the interest of the witness was balanced, and therefore he was competent.

BY THE COURT. It is true, that if the plaintiff is defeated, the witness will be liable to the plaintiff on his warranty of title in the property; and therefore he is, in that view of the case, directly interested to maintain the plaintiff's title; but will not the property go to pay his debt to Nugen, and is he not, in that view, directly interested to defeat the plaintiff, so that the judgment which Nugen has against him may be paid by this property? I think his interest, so far as affects the question of competency, is balanced; he is a competent witness; his bias and feeling in the matter are for the jury.

Objection overruled.

STATUTE OF FRAUDS.

[Supreme Court, Licking County, Ohio, October Term, 1846.]

Before Judges Wood and Read.

WISELY V. BARCLEW.

[Reported by L. CASE.]

Statute of frauds—Growing crops—Personalty—Realty.

A contract for the sale of a crop of growing oats, is not within the statute of frauds.

Growing crops, such as oats, raised annually by labor, are, in view of the statute of frauds, personalty, and not realty.

ERROR.

This was an action of trespass, brought by *Barclew v. Wisely*, for entering Barclew's close, and cutting and carrying away a crop of oats there growing. The declaration contained the *quare clausum fregit* and the *de bonis asportatis* counts. Wisely pleaded the general issue, with notice that he purchased of Barclew said growing oats, and that he entered and cut, and carried away said oats, by virtue of the license incident to such purchase, etc. On the trial in the common pleas, a bill of exceptions was taken by Wisely, which, among other things, states in substance, "that Barclew proved his possession of a certain field of growing oats, into which Wisely entered and cut, and carried away said oats, and after proving their value, rested his case. Wisely in defense proved, that before that time, he had recovered a judgment against Barclew, and caused an execution, issued thereon, to be levied on the oats; that on the day fixed by the constable for their sale, in consideration of Wisely's forbearance in making sale, Barclew paid on said judgment fifteen dollars, in part payment and in full satisfaction of the balance due thereon. Barclew gave and Wisely received said crop of growing oats—Barclew reserving, however, the right to redeem them, provided he paid Wisely, against the time they were ready for harvesting, the amount in money for which they had been sold, as above stated. Wisely also
282 proved that the money was not paid against the time the oats were ready to harvest, and that thereupon he entered said close, and cut and carried away said oats, in pursuance of his contract as above stated." Whereupon the court charged the jury, that if the contract set up by

Wisely in defence was not reduced to writing, and signed by the parties, Wisely could not be protected thereby from being a trespasser, unless he had received the possession of said field under said contract; that without such possession, the contract being in parole, was void in law.

Verdict and judgment for plaintiff.

L. Case and H. H. Hunter, for Plaintiff in Error.

1. Is a contract for the sale of a growing crop of oats within the statute of frauds? Is such crop a chattel, or real interest, in view of that statute? In Ohio, no reported decision is to be found on this question; yet the understanding of the people has been general that such crops were chattels. Sheriffs and constables are in the daily habit of so treating them in levying *fi. fa's*, and purchasers at such sales have supposed they took good titles. No statute gives this power to these officers. The eighty-fourth section of the Justice's Act, O. R. S., p. 520, cited by defendant's counsel, so far from giving such power, contemplates it as already existing, and merely undertakes to regulate it. It certainly has no relation to sheriffs. The absence of any authoritative decision in this state upon this question, leaves the court at liberty to make a decision in conformity with the general understanding of our people on this subject, upon which many titles depend, unless there shall appear to be some insurmountable legal impediment, which there is not, as we shall now show.

"The annual growing crop does not pass to a purchaser of land at a judicial sale, nor is such crop under our law appraised in appraising realty, nor is it covered by the levy of a mere *lev. fa.*, but can only be reached by a separate levy of a *fi. fa.*" 12 O. R., 95.

"The distinction is between growing trees, fruit or grass, or other natural products of the earth, on the one hand, and growing crops of grain and other annual productions raised by the cultivation of the earth and the industry of man, on the other; the former are parcel of the land, and a contract in writing is requisite to make a valid transfer; the latter are personal chattels, and not within the statute of frauds." 1 Denio's N. Y. Rep., 550.

"The sale of any growing produce of the earth, raised by labor and expense, in actual existence at the time of the contract, whether it be in a state of maturity or not, is not to be considered a sale of an interest in or concerning lands." Greenl. Ev., 308, 310.

"A growing crop may be sold by parole." 2 John. Rep., 421.

"Wheat growing is a mere chattel, the property of which will pass by parole, the statute of frauds not applying to such a case." 9 Cowen Rep., 39.

To the same effect, see 2 Kent's Com., 341, note; 4 do., 450; 2 Dana's Rep., 206.

2. The court erred in charging that the contract was *void*, not being in writing, and there being no act of part performance. Our statute of frauds does not declare such contracts *void*, but merely provides "that no action shall be brought," etc. O. R. S., 423, § 5. The consequence is, that any act done pursuant to such parole contract, is valid, and the party may *set up such contract in his defense as a license*, in an action of trespass. Swift's Digest, 258, 260; 6 East., 602.

Henry Stanbery and Mathiot & Buckingham, for Defendant in Error.

The single question is, whether the property in a growing crop can pass by parole without any act of part performance. There are but two

cases in which such an interest can pass by a parole sale, or is considered a chattel interest; and these arise out of statutory provisions for the sale of growing crops on execution from a justice of the peace, and by executors and administrators. Swan's Statutes, 344 and 520.

The doctrine of the law is, that they are a part of the realty—an interest in land; and a sale of such an interest by parole, is no more valid than a sale of the soil upon which the crop is growing.

READ, J., held, that growing crops raised by annual labor, have ever been considered in Ohio as personalty, and that a contract for the sale of them need not be in writing, not being within the statute of frauds.

Judgment reversed.

500

AMERCEMENT.

[Supreme Court, Greene County, Ohio, June Term, 1847.]

Before Judges Hitchcock and Avery.

J. S. BEREMAN, SHERIFF OF FAYETTE CO., v. THE PRESIDENT, DIRECTORS, AND CO. OF THE BANK OF XENIA.

Held, That a sheriff is not liable to an amercement for refusing to execute a writ of *venditioni exponas*, except the printer's fee is advanced.

This was a writ of error to the judgment of the court of common pleas of Greene county, on a motion to amerce the plaintiff in error, for refusing to execute a writ of *vendi*. which had come to his hands as the sheriff of Fayette county.

The facts of the case, so far as necessary to present the question decided, may be stated as follows: At the April term of the court of common pleas of Greene county, the defendants in error received a judgment for \$796.78 damages and costs of suit, against John Popejoy and others. On the 7th day of October, 1845, a writ of *venditioni exponas*, directed to the sheriff of Fayette county, was issued upon said judgment out of the court of common pleas of Greene county, and was delivered to the plaintiff in error, as the sheriff of Fayette county, to execute.

At the return time, the sheriff returned the writ, endorsed as follows: "September 2d, 1845. This writ returned unexecuted, because it is not attested, as required by the statute."

The motion to amerce was made on the 6th October, 1845, a day in the term to which the *vendi*. was returnable. On a day in the same term, but subsequently to the filing of the motion to amerce, the plaintiff in error moved for and obtained the leave of the court to amerce, and did amerce his return. The amendment consisted in the following addition to the original return: "This writ is returned also for the reason that there was no money in my hands to pay printer's fees."

The court gave judgment for the defendants in error for the amount due upon the execution, and for the statutory penalty, to reverse which this writ of error was brought.

R. F. Howard, for plaintiff in error, contended that the sheriff was not liable to an amercement for refusing to execute the writ, because no money had been advanced him, with which to discharge the fees of the printer for publishing the notice of sale, and cited Swan's Stat., p. 477, § 17.

Harlan & Gest, for defendants in error, insisted that the plaintiff in error could not be permitted to avail himself of any matter of excuse

stated in the amended return, for the reason that the amendment was made since the filing of the motion.

The court decided that the amended return had relation back to the time of making the original return, and that the plaintiff in error was not liable.

Judgment reversed.

LIEN OF JUDGMENT.

538

[Supreme Court of Ohio, Seneca County, July, 1844.]

Wood and Birchard, JJ.

BANK OF NORWALK V. THE CLINTON BANK OF COLUMBUS, AND OTHERS.

A bill in chancery will lie to settle conflicting judgment liens. *Vide* 3 Ohio, 514; 6 Ohio, 154.

The judgment lien binds lands previously aliened fraudulently, although the legal title, as between the parties, may have passed before judgment.

C. and N. each obtain judgment against their debtor at the same term. C. without issuing his execution within a year, obtained a decree to subject to his judgment the land fraudulently aliened. N., having issued his execution within the year, obtains such a preference, that he may recover from C. by bill in chancery the amount received by him under his decree.

IN CHANCERY.

This case was appealed to this court from the common pleas in Seneca county, in July, 1844. The case came up on a demurrer, filed by the Clinton bank, to the complainant's bill. The bill set forth that the Clinton bank filed their bill in chancery before the court of common pleas of Seneca county, on the 2d of April, 1838, in which they set forth that said Clinton bank obtained a judgment against Joseph Mason and others, at the June term, 1837, for \$620 and costs of suit, upon which judgment an execution was issued, and a levy was made, as alleged in said bill, upon lot number 4, etc. (being the lot in controversy), and upon other real estate which had been returned by the sheriff. The complainants in said bill further alleged, that J. M., the principal debtor in the judgment on the 24th of December, 1835, was seized in fee of said lot 4, and so continued seized until March, 1836, when J. M. and his wife executed a deed to one Boley, upon a pretended consideration of \$1,000, but in fact upon a gambling consideration, prohibited by the statute; that Boley and wife, on the 6th of October, 1836, upon a like pretended consideration, but in fact without any consideration at all, executed a deed of said lot to one Pritchard, both of whom were made defendants to said bill; that the real object of said last mentioned deed was to carry the appearance upon the record of said county of a *bona fide* transaction, and that in fact it was a fraud, and the conveyance was made for the benefit of said Boley. It was alleged in said bill that the consideration was merely colorable, and that no money passed. The bill prayed that the conveyance to Boley, and from him to Pritchard, might be set aside, and the land sold to pay the debt of the Clinton bank. Decree was obtained by the Clinton bank, and the land was bid in by Neil for the benefit of the bank.

The complainants, the Bank of Norwalk, further allege, that the allegations in the bill, so filed by the Clinton bank, are true, except that no levy was made on said lot number 4, under the judgment so obtained by

the Clinton bank, but that in fact a year and more was suffered to elapse without levy; that complainants, the Bank of Norwalk, were not parties to that bill; that they had also obtained a judgment at law before the same court, and at the same term, to wit, June term, 1837, against the said J. M. and his sureties, in the sum of \$827.23 and costs of suit, and thereupon caused to be issued an execution, which was levied within a year from the rendition of said judgment upon the said lot number 4, which levy had been followed by the issue of *venditioni* to the date of the filing of the bill. Complainants' bill was filed after the sale to Neil, under the decree in favor of the Clinton bank; and it prayed that the deeds to Boley, to Pritchard, and to Neil, might all be set aside, and the land sold to pay complainants' debt. The Clinton Bank demurred.

On behalf of the complainants, it was claimed that the deeds to Boley and to Pritchard were absolutely void under the statute against gaming; that the first deed from J. M. to Boley, being predicated upon a gaming consideration, was absolutely void, and that consequently Pritchard acquired nothing that he could convey; but further, if those deeds were good as between the parties, still they were void as to subsequent as well as prior creditors; and then the court would look into the facts to see how the case stood as between the two banks. The complainants had obtained their judgment at the same time the Clinton bank did theirs, but no levy had been made under the latter judgment; and they could not perfect their legal lien by a bill in chancery, but only by an execution upon their judgment, which they had neglected to do. That the complainants had made their levy within the year, and by that legal diligence had, as between the two banks, obtained a priority; that the sale to Neil under their decree, at best only transferred such rights to Neil as Pritchard had at the time the Clinton bank filed their bill; that, admitting the deed from J. M. to Boley, and from the latter to Pritchard, to be good, between themselves, yet, if it was void as to creditors, or might be avoided, the lien of the complainants' judgment was prior to the filing of 540 the bill by the Clinton bank, and was a continued and subsisting lien up to and at the time of Neil's purchase under the decree; and the complainants cited 6 Paige's Rep., 457, to show that a mortgage from a fraudulent grantee, without notice by the mortgagee of the fraud, is postponed to the lien of a judgment creditor of the grantor rendered prior to the mortgage, but subsequent to the deed under which he claimed title.

For the defendants, it was urged that the deeds to Boley and to Pritchard, as between the parties, were good; that, at the time Pritchard acquired his title, there was no judgment against J. M.; that the lien of a judgment rendered subsequently could not attach to the land; that the purchase under the decree was in good faith, and transferred the legal title to Neil, which had before been in Pritchard; that a purchaser from a fraudulent grantee, against whom no judgment existed either at the time of the deed to him, or at the time the title passed out of him, ought to be protected; and the Clinton bank was a creditor equally with the complainants.

The supreme court overruled the demurrer, and entered a decree for the complainants.

NOTES

527

OF SOME DECISIONS MADE BY THE SUPREME COURT OF OHIO.

[Hamilton County, May Term, 1847.]

Construction of wills—What words pass a fee—Poor relations. In *Doe ex dem. Williams and others v. Burrows and others*, held, that these words—"giving to my executors full and complete power as I myself possess, after my decease, to dispose of all my estate, real, personal and mixed, in the way or manner which they may think best calculated to carry into effect all the purposes specified in this my last will and testament, except that no part of my estate shall be sold at public sale"—were sufficient to vest the fee in the executors.

Also held, that these words—"if my estate should be more than the amount of the above bequests, my will is that my executors do distribute the surplus among my remaining relatives, whom they may judge to be the most needy; and they are to use their discretion as to this distribution, either making it in money or in the necessaries and comforts of life"—will, after the lapse of twenty-three years, though the statute of limitations is not a bar, be a sufficient authority to sustain a conveyance of land made by them to the husband of testator's niece.

Certificate of deposit not negotiable. In *Austin v. Miller*, held, that a certificate of deposit of money in bank, payable to the order of the depositor, with interest at a future day, on return of this certificate, was not negotiable so as to charge the endorser.

Construction of the watercraft law—Duebill for borrowed money. In *The Steamboat Arkansas Mail v. Fox*, held, that a duebill given in the name of the steamboat and owners, signed by the master for money borrowed, where it did not appear that the money was not applied to the use of the boat, was within the statute authorizing proceedings against watercraft by name, and that a duebill so signed was competent evidence to be submitted to a jury. Whether such a duebill by itself, and without other evidence, was sufficient to sustain the action, the court said was not necessary to be decided, although it was intimated it would be sufficient of itself.

Mistake in a bond, naming the wrong court. In *Avery v. Howard*, held, that where a bond for the forthcoming of a steamboat, seized under the steamboat law, named the wrong court as that from which the warrant issued, such mistake was fatal, and could not be helped by averment.

Scire facias—Misnomer. In *Lofthouse v. Thornton*, held, that a co-defendant, sued by a wrong Christian name, and as to whom the summons was returned not found, may be made party to the judgment by scire facias, suggesting the mistake. 528

Also that the record in the original suit would not be conclusive against him, but he would be at liberty to make any defence to the scire facias which he could have made to the original suit.

Sureties—Bond not executed by all the named obligors. In *The City of Cincinnati v. Scott*, held, that where a bond was given for the

OHIO DECISIONS.

Vol. IV

Hamilton County.

faithful performance of official duty, and only a part of those named as obligors in the beginning, signed the bond, in the absence of proof of knowledge and assent by those who did sign, they are discharged.

Stage proprietors. In *Heighway v. Voorhees*, held, that where a passenger induces the driver to deviate from the accustomed track for his accommodation, and the stage is upset in consequence of such deviation, such passenger cannot recover damages for an injury sustained from such upsetting.

Levy on chattels—Constables—Sheriff. In *Smead v. Diss* (*vide ante*, page 4), held, that where a sheriff has levied upon chattels, though he may not have removed them, they are in the custody of the law, and not subject to another levy by a constable.

Husband and wife. In *Symmes v. White*, held, that where A has title to land, subject only to a contingent right of dower in the wife of B, in case she survived her husband, and a conveyance is made to C, in which B and wife unite with A and wife, such conveyance bars dower in the wife of B.

Bankrupt law—Fiduciary capacity. In *Strader v. Baldwin*, held, that where the individual book-keeper in a bank, by collusion with the paying teller, embezzles the money of the bank, he is not acting in a fiduciary capacity, within the meaning of these terms in the bankrupt law.

Common carrier—Delivery to wharf boat. In *Wayne v. The Steamboat Albatross*, held, that however general the custom at Memphis, for steamboats to deliver goods to the wharf boat, such delivery, unless authorized by the owner, does not discharge the carrier.

DOWER.

[Supreme Court of Ohio, Union County, July Term, 1847.]

Hitchcock and Avery, JJ.

PRISCILLA BIGGS V. WESLEY ANNIM AND OTHERS.

IN CHANCERY.

This case, with another by the same complainant against other defendants, and a third in Logan county by the same complainant, were petitions for dower in two surveys of Virginia military land in Union county, and one in Logan county, containing in the aggregate about 2,000 acres.

The lands in which dower was demanded were patented to Benjamin Biggs on the 15th of March, 1822. In March or April, 1823, a writ of attachment was issued from the court of common pleas of Union county, at the suit of the Farmers' and Mechanics' bank of Steubenville, against the lands of Biggs, and duly served and returned to the April term of the court, 1823, levied on the lands in controversy.

In November, 1823, a judgment was rendered against Biggs in the attachment suit. In December, 1823, Biggs died. In April, 1824, the land was sold by the sheriff of Union county, under this writ, to the plaintiffs in attachment. The sale was afterwards confirmed by the court, and a deed executed by the sheriff to the bank. 541

At the July term, 1826, of the supreme court of Union county, the judgment in attachment was reversed. See *Colwell's Adm. v. The Bank of Steubenville*, 1 & 2 O. Rep., 377.

In 1830, the bank conveyed the land with covenants of warranty to Silas D. Strong. From Strong the land had been conveyed in separate parcels and at different times to the defendants.

These facts appeared from the bill, answer, exhibits and testimony in the cause.

O. Curry and *B. Stanton*, for the petitioner.

When lands have been alienated in the lifetime of the husband, the rule of assignment is, the value of the lands at the time of the assignment, *excluding* the improvements made by the purchaser. *Allen v. McCoy*, 8 O. Rep., 463.

When lands have descended to the heir, the rule of assignment against the heir, or his alienee, is the value of the land at the time of the assignment, *including* improvements. *Larrance v. Beam*, 10 O. Rep., 502.

The reason is, that when the land is alienated in the lifetime of the husband, the right to claim is inchoate; no assignment can be made by the purchaser, and he may make improvements upon the supposition that the dower estate may never attach.

When the alienation is after the death of the husband, the purchaser takes with full knowledge that the widow's right to dower has ripened into a perfect estate; and he may assign her dower at any time. And if he goes on and makes improvements, without assigning dower to the widow, he does it at his peril. The case is not changed by the levy of the attachment in the lifetime of the husband. It merely created a specific lien upon the land, for the payment of the debt due to plaintiff in attachment, and such other creditors as chose to avail themselves of

that proceeding, but could not in any way affect the dower estate of the wife. All lands descend charged with the debts of the ancestor, if he owes any; but whether the lien for these debts is general or specific, cannot change the question, or affect the widow's right to dower, or change the mode in which it shall be assigned. If it had been sold by the administrator of the husband for the payment of his debts, without 542 an assignment of dower, it would hardly be claimed that the purchaser would be in a better condition in regard to the rule of assignments than the heir.

We claim therefore that dower must be assigned to the petitioner according to the present value of the land, in one tract for each survey, and including the improvements made by the defendants, and those under whom they claim.

Allison, for the defendants, claimed that dower must be assigned to the petitioner in separate parcels, in each subdivision of the survey, and that she was not entitled to dower in the improvements made by the defendants, and those under whom they claim, and would have argued in support of these propositions, but was informed by the court that it was unnecessary.

HITCHCOCK, J. The petitioner's title to dower in this case accrued in December, 1823; and if she had resided in the state of Ohio, she would have been barred by the statute of limitations. But as she lives in Ohio county, Virginia, which is across the Ohio river, which in contemplation of law is "beyond the seas," she still has a right to prosecute her suit.

When lands were aliened in the lifetime of the husband, the widow was entitled at common law to have dower assigned to her according to the value of the land at the time of the alienation. This is also believed to have been the law in most of the states of the Union, and in this state until the case of *Allen v. McCoy*. Since the decision of that case, the rule in this state has been, the value of the land at the time of the assignment, excluding improvements made by the alienee.

It is also well settled, that when the land descends to the heir, the widow is entitled to dower according to the value of the lands at the time of the assignment, including betterments or improvements. In this case the lands were attached in the lifetime of the husband, and a judgment rendered. The husband then died, and the lands were sold, and deeds executed by the sheriff after his death. Now, what was the effect of these proceedings? The law under which these proceedings were had, was the attachment law of 1810, and the amendatory law of 1813. By the law of 1810, auditors were to be appointed by the court to ascertain the amount due the plaintiff and other attaching creditors, to sell the property attached, and make deeds to the purchasers. By the amendatory law of 1813, the auditors were dispensed with; the amount due was ascertained by the court, the property was sold, and the deed executed by the sheriff. The 13th section of the law of 1810 declares 543 the effect of the deed, which by that law was to be made by the auditors, and which, under the amendatory law of 1813, is made by the sheriff.

The law of 1813 repeals several sections of the law of 1810, but it does not repeal the 13th section. The same effect, therefore, which by the law of 1810, was given to the deed to be made by the auditors, is, by the law of 1813, to be given to the deed to be made by the sheriff. The

13th section of the attachment law of 1810, provides, that "every bargain, sale, assignment and conveyance, made by the said auditors, or any two of them, by virtue of the authority herein granted, shall be as binding and effectual as if the same had been made by said defendant prior to the service of said attachment."

In the case of the *Lessee of Parker v. Miller and others*, 9 O. Rep., 108, it was decided that a deed executed by auditors, in pursuance of this provision of the statute, overreached a deed previously executed by the defendant in attachment, but not recorded within six months from its date, nor until after the service of the writ of attachment. Now, according to the principles claimed by the counsel for the petitioner, if Benjamin Biggs had sold and conveyed these lands prior to the service of the attachment, the petitioner would not have been entitled to dower in the improvements made by the purchaser. And as the law declares that the deed made by the sheriff shall have the same effect, we hold that the petitioner is not entitled to dower in the improvements made by the defendants.

Dower will therefore be assigned to the petitioner separately in each subdivision of the survey, according to the value of the land at the time of the assignment, excluding the improvements.*

HUSBAND AND WIFE.

544

[Supreme Court of Ohio, Montgomery County, June, 1847.]

HEIKES V. PEEPAUGH AND WIFE AND ANOTHER.

The creditor of the husband cannot reach the wife's choses in action until the husband has reduced them into possession.

IN CHANCERY.

Heikes, in December, 1844, obtained a decree against Peepaugh for \$3,000. Upon execution issued, the sheriff returned no goods, lands, or tenements found, whereon to levy.

Peepaugh, in December, 1842, married Ann, the defendant, the widow of John Hale. Hale, dying "*intestatus et improles*," his widow inherited his personal estate, amounting to \$9,600. On her marriage with Peepaugh, administration was granted to the defendant, Sandham, who has in his hands about \$5,000 belonging to the estate.

The complainant filed his bill in January, 1845, charging that if Peepaugh obtained this money, to which he, as husband, was entitled, he would place it beyond the reach of his creditors, and praying that the administrator, the defendant Sandham, might be ordered to apply it to the satisfaction of the complainant's decree.

In November, 1845, Peepaugh and wife were divorced by a decree of the circuit court of Mason county, Kentucky; and on the 6th of May,

* In the case of *Parker v. Miller*, 9 O. Rep., 116, I find the following sentence in the opinion of the court, by Judge HITCHCOCK: "Although the property is bound by the levy of the attachment from the time of the levy, the title remains in the debtor, subject to this incumbrance, until sold and conveyed by the auditors." If the title remains in the debtor until the property is sold and conveyed, and the defendant dies before the sale or conveyance, does not the title descend to the defendant's heirs?

GROWING CROPS.

[Supreme Court, Montgomery County, Ohio, June Term, 1847.]

SEYBOLT V. BURTNER.

Held, that growing crops do not pass to purchasers at judicial sales.*

IN ERROR.

This was an action of trover. Burtner mortgaged his farm in April, 1835. The executors of the mortgagee, on a bill filed to foreclose, obtained a decree in August, 1844. An order of sale issued September 20, 1844; the premises were appraised October 31, and sold December 14; and the sale was confirmed.

Burton, the mortgagor, rented the land on shares, by a verbal lease, September 15, 1844. The tenant sowed the land in wheat, from the 1st to the 10th of October, 1844, and harvested the crop in July, 1845, leaving the landlord's share in shocks on the field. The plaintiff in error converted it. Judgment was given against him below for the value at the time of conversion.

Lowe & Houk, for Plaintiff in Error; *P. Odin* and *M. E. Cuwen*, for Defendant.

HITCHCOCK, J. The case of *Cassily v. Rhodes*, 12 O. R., 88, was not decided on the point raised in this case. But the court there seems to have laid down the law, that in judicial sales the purchaser takes the land subject to the rights of the tenants and debtors. The court feel bound by that authority to affirm the judgment below.

Judgment affirmed.

*The same doctrine was held by the supreme court at the late May term in Hamilton county, in the case of *Dunlap v. Hill*.

In this case, it appeared, that Hill, the defendant in error, mortgaged his farm on the 12th of February, 1842; that there was a decree of foreclosure on the 7th of October, 1843; that, on the 13th of August, 1844, an order of sale issued, under which, on the 7th of October of the same year, the land was duly sold to Dunlap, the plaintiff in error; that Hill, the mortgagor, who remained in possession up to the time of sale, sowed wheat on the land between the last of September and the day of sale; and that Dunlap, the purchaser, who entered into possession immediately after the sale, refused the application of Hill for leave to cut the wheat, and himself harvested the crop, and appropriated the proceeds.

Hill brought an action of trespass in the superior court of Cincinnati, and recovered judgment for the value of the crop, at the time of harvest, in the summer after the sale.

Here no lessee of the mortgagor intervened; and the case was between the purchaser under the decree of foreclosure and the mortgagor, who had planted after the issuing of the order of sale, and after the appraisement, and within a week of the day of sale.

The plaintiff in error contended, that the case of *Cassily v. Rhodes* was not decisive of this case; that the mortgagor was not entitled to recover, and that, in case of recovery, the measure of damages should have been the value of the wheat in the ground, at the time of the sale.

The court, however, held, that *Cassily v. Rhodes* had settled the law in Ohio, that purchasers at judicial sales acquire no interest in growing crops; and affirmed the judgment of the court below.

556

INJUNCTION.

[Court of Common Pleas, Hamilton County, Ohio]

Before Wm. B. Caldwell, P. J., at Chambers.

WILLIAM A. DELAVAN ET AL. V. JOHN MACARTE AND WIFE.

Equity will not interfere to enforce by injunction a contract for personal services. A celebrated equestrian agreed in writing with the owners of a circus, that he would perform for them during a certain season. He broke his engagement, and joined another circus; and a bill was filed to restrain him from performing for that circus: *Held*, that the proper remedy was at law, and that no injunction could be granted.

The complainants, owners of an extensive circus establishment, entered into a written agreement with the defendants, whereby the latter engaged their services as equestrians to the complainants, from the 18th day of January, 1847, through the then coming traveling season, for which they were to receive \$100 per week, and have all their traveling expenses paid; besides, complainants were to keep Mrs. Macarte's horse as one of their own, and furnish two horses for her carriage. Mrs. Macarte was further to have the one-third of a clear benefit in each place where she should perform during the winter months; complainants, however, to have the use of her name for benefits any time during her engagement with them, and not to require defendants to travel further south than North Carolina during the summer months.

The complainants in their bill set forth this agreement, and alleged that Mrs. Macarte was one of the most celebrated equestrians in the United States, and that their contract with her was of great pecuniary importance to them; that they had spent over \$2,000 in preparing suitable bills for announcing her performances in the states through which they intended to travel; that they had complied with their contract until the 12th of July, 1847, when the defendants left them without any cause, and joined "Spalding's Monster Circus," where they were now performing; that Spalding's circus was traveling just ahead of them, and performed in the same places where they had long previously advertised their circus to perform; that defendant's continuing with "Spalding's Monster Circus" was producing, and would produce them great and irreparable injury, which could not be compensated by any suit at law, as it was impossible to explain to a jury the actual extent of their injury; further, that defendants were aliens, without any permanent locality, and without property within the reach of law or execution: Prayer, that the defendants might be restrained from performing as equestrians in any circus company except that of complainants, until the end of the present traveling season, which would be about the 1st of November next; and for further relief.

Defendants in their answer admitted making the contract, but alleged as a cause for their leaving complainants, that the conduct of the latter in many respects had rendered Mrs. Macarte especially, very uncomfortable and unhappy.

Complainants read affidavits to contradict the allegations in the answer.

Fox & French, and *T. J. Gallagher*, for Complainants.

Walker & Kebler, for Defendants.

Complainants' counsel insisted, that equity had jurisdiction in the present case upon the ground of irreparable injury to complainants, unless an injunction were granted, and of the utter inability of defendants to respond in damages at law. 2 Story Eq., 143, § 742; 5 O. R., 188, *Putnam v. Valentine*; 1 Madd., 217; Walker's Intro., 592; Eden on Inj., 341; 2 Story Eq., 33, 34, 26; 1 S. and S. 590.

They further insisted, that in cases like the present, a court of equity will endeavor to accomplish indirectly what it cannot enforce specifically. *Morris v. Colman*, 18 Ves., 436; *Clarke v. Price*, 2 Wilson, 151; Eden on Inj., 388. 587

Defendants' counsel maintained, that the contract was one for personal services, for the breach of which there was a remedy at law, and cited *Kemble v. Kean*, 6 Simmons, 333, (9 Cond. Eng., C. R., 296,) where Kean agreed that he would act for twenty-four nights, during a certain period of time at Kemble's theatre, and that in the meantime he would not act at any other place in London; and the vice chancellor held that equity could not enforce the positive part of the contract, and therefore would not by injunction restrain a breach of the negative part.

Hamblin v. Dinneford & Ingersoll, 2 Edwards' Chan. R., 529, where Ingersoll had agreed in writing to act for three years at Hamblin's theatre, in New York, and nowhere else. Ingersoll left Hamblin, and engaged himself to act for Dinneford, at his theatre, also in New York. Upon a bill to restrain Ingersoll from acting, and Dinneford from permitting him to act, the vice chancellor held, that this was a mere matter between employer and employed and that there was a remedy at law.

Barnum v. Randall, 2 West. Law Jour., 96, where, upon Barnum's applications to restrain Randall, the Scotch giant, from exhibiting except for his benefit, the vice chancellor held, that contracts for mere personal services could not be enforced by injunction.

Defendants' counsel also cited *De Rivafrinolli v. Corsetti*, 4 Page, 264; *Kimberly v. Jennings*, 4 Simons, 340 (9 Cond. Eng., C. R., 300); and insisted further, that the contract as to Mrs. Macarte, a married woman, who was the principal party sought to be enjoined by this bill, being executory, was entirely void.

CALDWELL, P. J., in his decision, remarked, that however extensive might be the jurisdiction of chancery to enforce contracts specifically, it did not cover a case like the present, where the performance of the contract, from its very nature, could not be enforced directly. The case of *Morris v. Colman*, has been cited by complainants' counsel; but a partnership being proved between Morris and Colman, the injunction was very properly granted. In *Hamblin v. Dinneford, et al.*, a bill was filed upon a contract very much like the one set forth in the present bill, with this difference only, that there Ingersoll had also agreed not to play elsewhere during the stipulated time of this engagement with Hamblin. As to their leading effects, the two cases are identical; and from that case, and others that have been cited, it appears to be now a settled rule, that equity will not interfere by injunction to enforce a contract for personal services. It certainly seems to be a high stretch of power to interfere with a person in following his ordinary and regular business, upon an application for an injunction. The injunction must be refused. 588

8

WATERCRAFT.

[Supreme Court of Ohio, Lucas County, August Term, 1847.]

Before Judges Birchard and Avery.

SCHOONER JANE LOUISA V. CHARLES H. WILLIAMS.*Watercraft law—Usage—Evidence.*

Where the usage of trade is for the consignor to direct the master, by memorandum on the bill of lading, to collect freight and charges of the consignee, and the master does so, the watercraft is liable for the same and where there are duplicate bills of lading it is sufficient to produce the one given to the master, though notice be given to produce the other..

This was an action brought by Williams, in the court of common pleas, under the Watercraft law, allowing proceedings *in rem.*, and upon the following state of facts: Williams, a forwarding merchant, at Toledo, consigned a quantity of flour, by defendant, to M. S. Hawley, a commission merchant, in Buffalo, with a direction, marked on the bill of lading, to the master, to collect of Hawley, on delivery, the charges of Williams, together with his advances made for canal charges, insurance, etc., that had accrued before delivery to defendant.

A demurrer was filed by defendant, which was overruled at the trial, the plaintiff proved by the deposition of Hawley, the payment by Hawley to the master, of the charges according to the direction of the bill of lading shown him, and according to the custom of merchants in this trade.

The counsel for defendant then proved that it was the custom of merchants to make out duplicate bills of lading, one to be kept by the consignor, and one delivered to the master. He proved service of a notice on plaintiff's attorney to produce his copy of the bill of lading, and for want of compliance with it, objected to plaintiff's giving evidence of the contents of that kept by the master, and shown to Hawley, although plaintiff had proved service of a like notice upon the defendant, before reading Hawley's deposition. Judgment was given for plaintiff, in the court of common pleas, and the defendant sued out a writ of error.

Tilden & Baker, for plaintiff Williams, cited *Kemp v. Coughtry*, 11 Johns. Rep., 107; *Canal Boat Huron v. Simmons*, 11 O. R., 458; *Emery v. Henry*, 4 Greenl. Rep., 407; *Abbott on Shipping*, p. 156; *Story on Agency*, § 116.

D. O. Morton, for Schooner.

By the Court. The declaration sets out a contract which the master was competent to enter into, and the proof brings the case within that clause of the statute which makes the vessel liable for damages arising out of the non-performance of any contract for the transportation of goods.

When the course of trade is such that the consignee, when so directed, pays the charges to the master, to be paid over to his immediate consignor on the return of the vessel as is the custom in our lake trade, the contract of transportation is not performed until the money is paid over, and in default of payment the vessel is liable. The contract arises from the acts of the parties and the course of trade, and the owners of vessels embark in the trade with a view to that custom, and it devolves upon them the necessity of selecting responsible officers. The contract is entire, and the collecting and paying over the charges is not a mere personal trust in the master, as contended for by defendant's counsel.

A proper foundation was laid for the introduction of secondary evidence of the contents of the bill of lading, although the plaintiff might also have had a copy.

An objection was also raised as to the competency of Hawley as a witness, but we cannot see that he was legally interested.

Judgment affirmed.

NOTE BY THE EDITORS: We avail ourselves of this occasion to furnish an abstract of all the cases thus far reported, in which the Watercraft law of Ohio has received a construction:

The Steamboat Monarch v. Finley, 10 O. R., 385. This was an action of assumpsit against the boat by name. The declaration was in the usual form, and the plea was the general issue in the name of the boat. On the trial, it appeared that some of the items of the account were contracted prior to the passage of the law. *Held*, 1. That the pleadings were right; 2. That debts contracted before the passage of the law were not within its provisions.

Canal Boat Huron v. Simmons, 11 O. R., 458. This was assumpsit against the boat by name, for provisions, such as sugar, flour, potatoes, and the like, furnished to the master for the use of the boat. *Held*, that such claim was within the statute.

Lewis v. The Schooner Cleveland, 12 O. R., 341. This was assumpsit against the schooner by name, for work and labor done by the plaintiff as a seaman. *Held*, that seamen's wages are within the spirit, if not the strict letter of the statute, and this action may be maintained. This case comes within the principle of *Canal Boat Huron v. Simmons*, 11 O. R., 458.

Steamboat Waverly v. Clements, 14 O. R., 28. The owners of a boat, after contracting a debt for which she might have been sued by name, sold her with notice of this debt. *Held*, that the boat still remained liable to a suit for this debt, in the hands of the purchaser with notice.

Jones v. The Steamboat Commerce, 14 O. R., 408. The boat had been sued, judgment recovered, and a sale made under this judgment. The boat was again seized for a debt incurred before the judicial sale. *Held*, 1. That there is no lien until seizure, which alone determines the priority; 2. That the purchaser at a judicial sale, takes the boat free from all claim for pre-existing debts.

Kellogg et al. v. Brennan et al., 14 O. R., 72. The original owners of the steamboat Walnut Hills, mortgaged her for debts contracted in building her. Afterwards, with consent of creditors, the boat was sold, a new mortgage given, and new debts subsequently contracted on account of the boat, for which judgments had been recovered against her by name. On bill to foreclose the new mortgage, *held*, that the mortgagees had not a lien preferable to the claims of the new creditors.

Canal Boat Etna v. Treat, 15 O. R., 585. This was an action of assumpsit against the boat by name, for materials, supplies, and labor, expended in building the same. Treat had contracted to build and deliver the boat, for a specific price, and had delivered it. *Held*, that he could not maintain this action against the boat, because, until delivery he was owner.

Goodsell v. The Brig St. Louis, 4 West. Law Jour., 173. This was assumpsit, in the court of common pleas of Lucas county, Ohio, July term, 1846, for labor and materials furnished for repairing the brig in the state of Michigan, which brig was in the custom of navigating the lakes from Buffalo to Detroit. *Held*, that our statute does not include debts

contracted in another state, and that it is wholly immaterial whether or not the brig would have been liable under the laws of the state where the debt was contracted.

The Steamboat Arkansas Mail v. Fox, 4 West. Law Jour., 527. This was an action of assumpsit against the boat by name, on a duebill given in the name of the boat and owners, signed by the master, for money borrowed. *Held*, that this was within the statute, unless it were proved that the money was not borrowed for the use of the boat.

20

COLLISION OF STEAMBOATS.

[Court of Common Pleas, Hamilton County, Ohio, June Term, 1847.]

EPHRAIM GOODRICH *v.* JOHN ROGERS, owner of the Steamboat Danube, and JACOB STRADER, owner of the Steamboat McFarland.

Collision—Joinder of parties.

The owners of two steamboats, though owning no interest in each other's boats, nor personally present at the time, are jointly and severally liable for injuries to the person of a third innocent party, by a collision between their two boats, occasioned by the carelessness of their two pilots while navigating the Mississippi river.

This was an action on the case, for injuries to the person of plaintiff by the collision of the above named boats.

The declaration stated, in substance as follows: That on the 1st day of July, 1839, John Rogers owned the Steamboat Danube, and Jacob Strader owned the Steamboat McFarland; that they were, as common carriers, navigating their said boats, by their servants upon the Mississippi river; that the plaintiff was a passenger on the McFarland, whose owner, for hire and reward, had undertaken to carry him safely from New Orleans to Cincinnati; and that the defendants, then and there by their servants, so negligently managed and navigated their said boats, viz., the said Rogers, by his servants, the Steamboat Danube, and the said Strader, by his servants, the Steamboat McFarland, that the said boats then and there came into collision, with force and violence, whereby the plaintiff lost the use of his hand, and was much bruised, and made sick, and subjected to loss and expense. Damages laid at \$12,000.

To this declaration each of the defendants pleaded separately by separate attorneys: 1. Not guilty; 2. The statute of limitations, which provides that all actions not therein enumerated, shall be brought within four years, etc.

The plaintiff joined issue on the pleas of not guilty, and demurred 21 to the pleas of the statute of limitations, which demurrers were sustained; and the cause went before the jury at the May term, 1847.

The proof was, that about one o'clock, on the morning of the 18th of June, 1839, at Walnut Bend, in the Mississippi river, the two boats ran together with such violence as to sink the McFarland almost immediately; that the plaintiff, a passenger on her, in endeavoring to extricate himself, in the confusion caused thereby, had his hand so mashed and torn by some part of the boat, as to be of very little use to him for life; and that he suffered and lost greatly by the accident. Proof was given tending to show the amount of actual damage sustained; and it was admitted by the defendants that the Danube belonged to Rogers, and the McFarland to Strader.

The defendant, Rogers, then introduced proof tending to show that his pilot was not in fault, and did not contribute by his negligence to the injury of the plaintiff, but that it was caused solely by the conduct of the other boat.

The defendant, Strader, introduced proof tending to show that his pilot was not in fault, and did not contribute by his negligence to the injury of the plaintiff, but that the collision was caused solely by the negligence of the Danube.

It was admitted by the plaintiff, that neither John Rogers nor Jacob Strader was present in person at the time or place of collision.

The plaintiffs then introduced proof tending to show that the collision was caused by the negligence of both pilots, and that by proper care and precaution, the collision would not have happened.

There was, as usual in collision trials, much apparently conflicting testimony, not susceptible of explanation, as to which boat contributed to the collision, which need not be stated here.

The jury found both defendants guilty, and assessed the plaintiff's actual damages at \$3,250; whereupon motions were made by each defendant, 1, in arrest of judgment; 2, for a new trial.

The reasons assigned for arrest of judgment were as follows:

1. That a joint verdict in this action cannot be rendered against the owners of the two steamboats for the damages arising to a third person, from the negligence of their several pilots in coming into collision; because the owner of one boat cannot be made liable for the negligence of the pilot of another boat, owned by a different person, and whom he did not employ, and over whom he had no control.

2. Because the declaration disclosing a contract of safe carriage between the plaintiff and the McFarland, the plaintiff having also proved that contract, is compelled to rely upon that contract and the breach of it as his sole cause of action against that boat; whereas, there being no such contract with the Danube, his cause of action against her owner is founded upon a pure tort, unconnected with contract; and the two causes of action cannot be prosecuted together in one suit. The plaintiff cannot waive the tort arising from the breach of his contract with the McFarland, and make her liable for a tort like that of the Danube, unconnected with his peculiar relation of passenger to his carrier. Having alleged and proved a breach of such contract, he is bound to rely upon that solely as his cause of action against the McFarland. He has therefore no right to set up a common cause of action under this declaration, against the owners of both boats.

3. Admitting that both pilots neglected their duty, and that the collision caused thereby injured the person of the plaintiff, and admitting that an owner is liable for injuries sustained by third persons by the negligence of his pilot; still, from the nature of the case, in the absence of statutory provisions on the subject, and of any adjudicated case to be found in point, there can be no joint action against the two separate owners, to recover the damages occasioned by such negligence, upon the general principle of the common law, that a joint tort requires a joint *consent*, *aim*, and *intention*, among the several tort feasers *to do the act* which occasions the damage; and though the plaintiff has suffered from the act of the two pilots, or the collision, yet it was not a joint act, because there was no joint intention; in other words, *there was no such thing known to the law as a joint negligent tort.*

We omit the reply of plaintiff's counsel to the above positions, as the substance of their argument is contained in the opinion of the court, with additional reasons of the court itself.

The counsel for plaintiff cited 1 Chit. Pl., 66, 74, 124, 135, 190, 432; 7 E. C. L. R., 346; 1 O. R., 47; Barr's Pa. State R., 47; 39 E. C. L. R., 233; 2 McLean R., 149; 1 Blackf., 139; 5 Johns. R., 280; 2 O. R., 33; 1 Johns. R., 290; Story on Agency, § 454; 3 Wend., 158; 2 Ste. N. Pr., 1023; 4 Serj. & Rawle, 17; 3 Ste. N. Pr., 2237; 2 *Id.*, 1024; 2 Sumner, 567; 7 Hill.

The counsel for defendants cited 1 Hill, 480; 12 E. C. L. R., 198; 1 Mee. & Wels., 504; 2 Carr & Payne, 417; 3 Ste. N. Pr., 2339; 6 Wharton, 313; 2 Pick., 621; Story on Bail, sec. 601; 8 T. R., 186; 20 Pick., 479; 2 O. R., 169; 21 Wend., 615; 6 Hill, 592; 3 Mee. & Wels., 244; Story on Agency, sec. 308, 2 E. C. L. R., 697; 6 Co. R., 5, Hayden's Case; 10 Mee. & Wels., 114; 3 Man. & Gr. 53, in 42 E. C. L. R., 40; 9 Watts & Serj., 32; Abbott on Shipping; 6 Hill, 592; *Wright v. Lathrop*, in 2 O. R., Story on Agency, secs. 398 and 456, and note; 2 Vern. R., 9; 20 Pick., 478; 2 Conn., 206; 38 E. C. L. R., 593; 5 Barn. & Cres., 547; 12 E. C. L. R., 311; 6 Mee. & Wels., 497; 4 Metcf., 49; 3 B. & A., 304, in 5 E. C. L. R., 295; 5 O. R., 410; 12 Pick., 176.

Messrs. Eaton & Justice, Chase & Ball and *E. P. Cranch*, for the Plaintiff; *Messrs. Gholson & Miner* and *T. Walker*, for the Defendant Strader; *Messrs. Fox & Lincoln*, for the Defendant Rogers.

CALDWELL, P. J., charged the jury in substance as follows: That all owners of boats navigating the Mississippi river, as common carriers, are bound so to use their right as not to cause injury to others; that the carelessness of the two pilots was a joint violation of this great duty, which they owed the public; that the plaintiff, as a lawful traveler on the river, has a right to enforce that duty upon any or all who violated it; and that in actions *ex delicto*, as the present is, all who joined in the act which caused the injury, are jointly and severally liable for the consequences of that act. The sole questions are, what damage did the act cause the plaintiff, and who did the act? If the act were caused by the negligence of both pilots, both owners are liable; and each is liable for the whole damage.

Where the collision is one entire act, and the injury suffered by the plaintiff is one entire injury, it is impossible to say how much of that injury was done by one boat, and how much by the other. Each one who contributed to it is liable for the whole, and all are jointly liable. It is a general rule, in actions sounding in tort, that all who join in a tortious act, are jointly and severally liable for the damages. If the tortious act be negligently done by pilots of steamboats, the law simply substitutes the owners for the pilots as defendants, in order to hold them liable for the consequences. The plaintiff alleged and proved a contract with one of the boats to be carried as a passenger to Cincinnati, and was at the moment of collision on board of her as such passenger. He does not, however, rely upon the breach of that contract for his cause of action against her owner, nor is he compelled to do so. There are rights and duties far above any contract, and which cannot be strengthened or taken away by contract. Of such nature are the rights and duties disclosed in this declaration, and arising out of the facts there stated. It is the right of every citizen to use the great highway of the Mississippi river to travel from port to port. It is the duty of every citizen to so use that right, as to injure no other man by his

carelessness or ignorance in navigation. If there was a joint violation of this rule of law by the two pilots, there was a joint tort committed, for which their owners are jointly liable. In order that two defendants may be joined in an action in tort, it is sufficient that the declaration discloses a tortious act, in which they could in point of law and fact have joined; and to justify a joint verdict against any two of them, the jury must believe those two did join in the act which caused the injury.

Motion in arrest of judgment overruled, and judgment entered for amount of verdict.

Bills of exceptions were signed by the court at the request of each defendant.

JUDGMENT IN OTHER STATES.

212

[Court of Common Pleas of Licking County, Ohio, October Term, 1841.]

SETH WILLIAMS V. ASA GUERNEY.

[Reported by G. B. SMYTH.]

A judgment rendered in any of the United States, pursuant to the law thereof, although personal service was not made on the defendant, has the same effect in every other state, as it had in the state where it was rendered.

This was an action of debt. The declaration counted, in the usual form, on a judgment rendered by the court of common pleas, of the county of Hampshire, Massachusetts, in August, 1838, against Asa Guernsey and others as partners. Service in the present case was made on Guernsey only.

The defendant, after craving oyer of the transcript (of which profer was made), pleaded, that "at the time of the suing out of the original writ, in said supposed recovery, and continually since, he was not a resident or inhabitant of the commonwealth of Massachusetts, nor within the jurisdiction thereof; nor was he served with any process thereon; nor did he appear thereto in person, or by attorney; but said supposed recovery was had without any notice to him or attachment of his property."

By inspection of the record, the following entries appeared, which, with the writ and return referred to, were the only process against the present defendant, viz.:

"And it now appearing to the court here, upon the suggestion of the plaintiff's attorney, and the examination of the writ in this case; that said writ was served upon the said Asa Guernsey and Darius Ford two of the defendants named therein, by leaving a summons at the last usual place of abode of each of them within said county, and it further appearing that at the time of the service of the writ aforesaid, the said Asa and Darius were not inhabitants of or residents within this commonwealth, it is therefore ordered by the court that the plaintiff cause an attested copy of this order to be published three weeks successively in the Northampton *Courier*, a newspaper," &c., "the last publication to be twenty days at least before the term of this court next to be holden," &c., "that the said Asa and Darius, two of the defendants named in said writ, may have notice of the pendency of this action, and then and there appear if they see cause, and answer thereto." 213

Here follows a certificate of the attorney and clerk, that the publication had been made pursuant to the order. Judgment was at the next term rendered against Guernsey and Ford by default.

The plaintiff replied to the foregoing plea in substance, that the defendant, before the suing out of the said original writ, had been an inhabitant of Massachusetts; that the said writ was served, and the order and publication of it were made as in the record recited; which being done, "it was legally competent for said court, according to the laws and usages of the commonwealth of Massachusetts," to proceed to judgment against this defendant; that by the same laws and usages, the defendant, Guernsey, was entitled as of right to a review of said judgment, within one year after the rendition thereof; and if this was not done, he was, at any time within one year after he had notice of the judgment, and not after, entitled to apply to the supreme court of Massachusetts for a review of the same. The replication then averred, that on the 1st day of September, 1838, the defendant had notice of the judgment, and did not within the one year thereafter, as of right or otherwise, demand a review thereof; wherefore, by the laws and usages of Massachusetts, the judgment became, and was final and unimpeachable in its effect, and that the faith and credit thereof in that state was that of a debt of record. To this replication there was a general demurrer and joinder.

Mathiot & White and *H. Stanbery*, for defendant, in support of the demurrer, cited numerous authorities from the reports of Massachusetts, New York, and Ohio, in reference to the effect of judgments of the sister states, and contended that all such were of no effect in other states, unless a personal service had been effected upon the defendant. They further contended that no legislative act of one state could affect the rights of a citizen of another in a personal action, unless such person had been served with process in the proper jurisdiction.

G. B. Smythe and *Hunter*, for the plaintiffs, produced and read from the Revised Statutes of Massachusetts (pages 552 and 565), certain statutory provisions to the effect set forth in the replication. They cited the constitution of the United States—that "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state," and that congress should by law prescribe the "effect thereof;" also the act of congress, approved May 26, 1790, by which it is provided that the "records and judicial proceedings" of each state "shall have such faith and credit given to them in every court within the United States, as they have by law or usage in the courts of the state from whence the said record are or shall be taken." Also, the opinion of the court in *Mills v. Duryee*, 7 Cranch, 481, that "if in such court," (the court from which the record is taken), "the judgment has the faith and credit of evidence of the highest nature, namely, record evidence, it must have the same faith and credit in every other court. Congress have declared the effect of the record, by declaring that faith and credit shall be given to it. It remains then only to inquire in every case, what is the effect of a judgment in the state where it is rendered." Also *Hampton v. McCormick*, 3 Wheat., 234, namely: "A judgment of a state court has the same credit, validity and effect in every other court within the United States, which it had in the state where it was rendered; and whatever pleas would be good to a suit brought in such a state, and none others, can be pleaded in any other court within the United States." They also quoted 13 Pet. R., 312, and 4 Wash. C. C. R., 17.

It was therefore claimed that the effect of this judgment in Massachusetts, being that of a conclusive record against the defendant, the same effect obtained here, and the judgment could not now be impeached.

SEARLE, P. J., after full argument, overruled the demurrer, and directed judgment to be entered for the plaintiff; holding, that under the law of congress and the constitution of the United States, the defendant was concluded by the laws of Massachusetts.

SUFFRAGE.

356

[Huron Common Pleas, March Term, 1848.]

WM. SUTTON V. MCILHANY ET AL.

Right of suffrage—Conviction of penitentiary offense—Pardon after expiration of sentence.

This was an action on the case, brought by plaintiff against the defendants, trustees of Lyme township, because they refused to receive the plaintiff's vote. The questions submitted to the court were raised by demurrer to the replication of the plaintiff to one of defendants' pleas. The declaration alleges that on the 13th of October, 1836, a general election was held in said township; that defendants were trustees of the election; that the plaintiff was then and there a duly qualified voter, and tendered his vote, and which said defendants then and there *wilfully, wickedly, and corruptly* rejected, etc.

The defendants pleaded, first, the general issue; secondly, that the plaintiff, at, etc., was indicted and convicted for keeping instruments for counterfeiting, was sentenced to the penitentiary for the term of three years, and before the grievance complained of, had served out his term therein.

To the second plea the plaintiff replied, that in September, 1844, after the expiration of the term of sentence, and before the grievances complained of, Thos. W. Bartley, the then acting governor, by virtue of the authority vested in him, etc., granted to the plaintiff a general pardon from said sentence, etc.

The defendants demurred to this replication.

357

Ezra M. Stom, for the Plaintiff.

Samuel T. Worcester, for Defendants.

Per Curium—SADLER, P. J. The principal question intended to be raised by the pleadings in this case is, whether the governor, after the expiration of the sentence, can by his pardon restore the culprit to his civil rights. There are other questions raised in the case, and we will dispose of them *seriatim*.

The first objection to the replication is, that it does not allege the pardon to be under seal.

Art. 2d, § 5th, of the state constitution, provides, that "after conviction, the governor shall have power to grant reprieves and pardons, except in cases of impeachment." And the statute (Swan's), page 239, declares that the pardon "shall be under the hand of the governor and the seal of the state."

The legislature have the undoubted right to prescribe the mode of granting pardons, whether they shall be by parol, in writing, or under seal, and how they shall be authenticated. It has required them to be "under the hand of the governor and the seal of the state." A pre-

tended pardon, issued without the seal, would be a nullity. It would be a private, and not an official act of the governor. When the law requires an instrument to be sealed, and it becomes necessary in the court of pleading to set it up, by either party, the party pleading it must aver it has a seal. 1 Chitty Pl., 348-349; 12 John. Rep., 197; 1 Saund., 291, n. 1.

The demurrer therefore in this respect is well taken, and the plaintiff has leave to amend on the usual terms.

It is next urged that the official character of the executive is improperly described. He is described as "Thos. W. Bartley, the then acting governor of the state." It is said there is no such officer as the "acting governor;" that he was speaker of the senate, and as such discharged the duties of governor, the office of governor being vacant. In case of the death or removal of the governor, the constitution provides that the "speaker of the senate shall exercise the office of governor." Art. 2d, § 12. *De facto* then, the speaker is governor, the acting *ex officio* governor. If he had been described as speaker of the senate, discharging the duties of governor, it might perhaps have been more technically correct; but it would have conveyed the same idea, and meant precisely the same thing. The official character of the executive we think is well described.

358 Can the executive, after the expiration of the sentence of imprisonment, grant a pardon to restore the culprit to his civil rights? By the statute (Swan, 238-9) it is provided that persons convicted of penitentiary offenses, etc., "shall be deemed to be incompetent to be an elector, juror, or witness, or to hold any office of profit or honor within the state, unless the convict shall receive from the governor a general pardon," etc.

It is claimed by the defendants that these disabilities, as they are no part of the sentence of the court, are not of themselves the subjects of pardon, but are incident to the sentence. That it is from the *sentence* of the court only, that the executive can grant a release; and when the sentence has been endured, there is nothing left upon which the governor's pardon can operate. That when a convict is pardoned and released from the execution of the *sentence*, as incident to the sentence, his disabilities are removed, but that they cannot be reached by the governor's pardon, except through the sentence itself.

Are these disabilities a mere incident to the sentence, or are they a part of the punishment for the offence? Without the aid of the statute, none of these disabilities would follow the conviction and sentence, as incident to them. The legislature might have left it discretionary with the courts, whether to impose these disabilities as a part of their sentence or not. But instead of that, as a part of the punishment, and in many cases the most important part, these disabilities are imposed upon the convict.

It is to be presumed that the framers of the constitution used the term *pardon* in the sense it had been used in similar instruments, intending to give the governor the same pardoning power similar executive officers had exercised, subject only to such limitations as the constitution itself imposed.

Under the common law all offences were pardonable with but few exceptions—such as imprisonment beyond the realm, or where private justice was principally concerned. In the latter case, the prosecutor, as he was to receive a part of the penalty, could release the

prosecution. 4 Black. Com., 398-9. But as the convict, till pardoned, was civilly dead, all rights acquired during his civil death, whether to his property confiscated or otherwise, would be protected. In cases of attainder, the corruption of blood having descended to his children, then, in *esse*, nothing, it is said, could restore it in them but the transcendent power of parliament. Yet the culprit himself, by a general pardon, was made a new man, and freed from all disabilities. 4 Black Com., 402; 3 John. cases, *People v. Pease*, 333. Subject to certain limitations, the King's pardon will 369 in all cases restore competency to witnesses, no matter what the offense. 1 Stark Ev. 99. And Phillips says, (1 Phil Ev., 35), "it is highly, expedient a pardon should be allowed to have this effect, and that a discretionary power should be vested in the crown to remove such incapacities. Otherwise, a person once convicted of felony, would be stigmatized for life, and treated as infamous, in courts of law, though in the opinion of mankind, his character for truth and honesty may have been completely redeemed." Mr. Phillips refers to various authorities, not within my reach; and I have been unable to examine them, to see whether the pardons were granted after the expiration of the sentence. He does not seem however to question the right of the executive to pardon either before or after. In the case of *The U. S. v. Tom Jones*, for murder, tried in the circuit court before Justice Thompson, (2 Wheeler's Crim. Cases, 451, the question was decided. During the trial, one Oliver King was called as a witness for the prosecution, and was objected to for infamy of character. He had been convicted of grand larceny, sentenced to the penitentiary, served out his sentence, and was afterwards pardoned by the governor, expressly for the purpose of making him a witness in the case. Justice Thompson overruled the objection, and said he had no doubt of the efficacy of the pardon, although not granted till after the expiration of the sentence. I feel constrained to follow the opinion of the learned judge, and more especially as it was expressed in a capital case, where the prisoner was convicted mainly by this witness, and was executed—the learned counsel acquiescing in the opinion without any effort to reverse it. If a pardon will restore a witness' competency, it will also restore the party to his other civil rights.

The next objection to a recovery is, that the facts set up in the declaration constitute a criminal offense, for which, under the election law of 1841, the defendants would be punishable by imprisonment in the penitentiary. It is therefore claimed that the civil remedy is merged in the felony. A demurrer to the replication will reach any substantial defect in the declaration. A bad plea is good enough for a bad declaration, and the demurrer reaches back to the first error in substance, though not as to matters of form.

The declaration alleges that defendants, as judges of the election, "wilfully, corruptly and wickedly refused to receive plaintiff's vote," etc. The election law provides, among other things, that if any judge shall be guilty of any corrupt conduct, or wilfully neglect to perform any 360 duty enjoined, he shall on conviction be imprisoned in the penitentiary, etc. It is claimed by defendants that no private injury has been sustained, and if there has, the remedy is merged in the felony.

To our knowledge, it has never yet been decided, that a person cannot recover for private damage where the judges *wilfully* and *corruptly* refused to receive his vote. But the courts in New York, New Hampshire, and perhaps some other states, have held, that where the judges

acted in good faith and without malice, the plaintiff could not recover; while in Massachusetts and in this state, the contrary doctrine has obtained. *Jeffries v. Ankeny*, 11 O. Rep. 374. The court seemed inclined to sustain the action even where there was no malice, because the law afforded no other remedy. In such cases there is no other remedy now. If courts would sustain an action where there is no malice or fraud, *a fortiori*, where there was malice and wilful injury, is the private remedy merged in the felony? A defence of this character was set up in the case of *Boardman v. Gore*, 15 Mass R., 335, and counsel referred to a number of authorities to show no civil remedy could arise out of any criminal transaction. Chief Justice PARKER, in reviewing these cases says, "they are not decisive on the subject. Some of the judges, *arguendo*, have urged it was against public policy to permit a party who has suffered by the crime of another to seek a remedy by civil action; because he would be less likely to prosecute and bring to justice the offender. It is a matter of doubt to what extent the doctrine is now admitted in England. It is by no means clear, even in England, that a civil action cannot be maintained for an injury occasioned by the commission of a crime by another. This rule is certainly *not* in force in this country." The learned judge thinks, if true at all, it was confined to some particular cases, and particularly to those cases where, by the common law, the property of the offender was forfeited to the crown. In such cases actions would be fruitless, for the body could not be taken, and no property could be found. These reasons do not apply with us, and I can see no reason why the crime should preclude the party injured from seeking redress. In the case referred to, Chief Justice PARKER says: "Whatever may have been the reason on which the doctrine of the common law was founded, it is evident the reason has ceased with us." The defence is entitled to no favor. It is an acknowledgment that the defendants have wilfully wronged the plaintiff; but, because in so doing, they committed a penitentiary offense, they are excused from remunerating the plaintiff for his injuries. The defense is untenable, and ought not to be allowed.

361

INFANTS.

[Superior Court of Cincinnati, before Judge Johnston, January Term, 1848]

THE STATE OF OHIO EX REL. STEPHEN BALL *v.* ANNA HAND.

[Reported by J. W. SHIELDS.]

Infant—Right of custody—Habeas corpus.

This was a writ of *habeas corpus*, brought by Stephen Ball, the father, to obtain possession of his two daughters, one aged eight, and the other six years, from Anna Hand, their maternal grandmother.

The evidence was to the following effect: After the death of his wife, Stephen Ball was residing at the house of his father, with the two children. He had previously come under the influence of the Millerite excitement, almost entirely deserted his work, being a carpenter by trade, and was absent from home for short intervals, being engaged, it was supposed, in preaching the doctrines of his sect. In company with his father, he abandoned his mother and his daughters, leaving them no adequate means of support, and repaired to Cleveland, the great seat of the Millerite excitement. Mrs. Ball, the mother of Stephen, had the charge

of the children for a time, but finally took them to Mrs. Hand, alleging that from want of means and health, she was unable to take care of them. Ball, on his return home, expressed no dissatisfaction with the disposition his mother had made of the children. Shortly after this he joined the community of Shakers, and has ever since been one of their number. Ball is hopelessly insolvent, and has no means of support for himself and children, except those derived from the Shakers. He has professed that he cares no more for his children than the children of others, it being his duty to love all men exactly alike. He wished to gain possession of the children, in order to take them with him to the Shaker village. If taken there, they would be placed under the care of the "female care-takers" of the sect, and he would not direct their education or training, but would be allowed to visit them freely at all proper times. A member of 362 the Shakers was examined as to their doctrines, and, on request of his Honor the Judge, referred him for further information on this subject, to several of their standard works. Ball's moral character was unimpeached; he is amiable, and his children seem to love him; but they expressed their aversion to go with him to the Shaker village. They had once been with him there, on a visit of a few weeks. Mrs. Hand's character is estimable. She keeps a respectable boarding house, generally has a sum of money out at interest, and possesses ample means for the support of the children. She teaches them to love and respect their father, sends them to day and Sunday-schools, and provides well for them in all respects.

It also appeared, that at the May term of the common pleas, 1848, Mrs. Hand was appointed guardian to the children. The same state of facts had been brought before Judge MORSE, and also the court of common pleas, on a writ of *habeas corpus*, and their judgment was against the petitioner. But as the case was decided by Judge JOHNSON on the merits, neither these points, nor the arguments of the counsel upon them, will be further noticed in this report.

Chase and Cushing for Relator.

Collins and Warder for Respondent.

Chase and Cushing for Relator:

The father is entitled generally to the custody of his children. 2 Kent., title Parent and Child.

Courts of Justice may, when the morals, safety, or interest of the child demand it *strongly*, remove the custody to others. *Ib.*

The court can exercise its discretion whether to return the children to plaintiff under all the circumstances of the case.

The first case of importance after Anne's reign, is that of *Mrs. Turberville-Rex v. Clarkson*, 1 Strange, 444.

The second case of note is in precise point. There a female child of nine years old (Lord Mansfield says six years old—*vide* Burr, 1436), was brought up in custody of her nurse, and it was moved that she be discharged, if under any restraint, which it appeared she was not. Then it was moved, upon producing her father's will, devising the custody of her to her uncle, that she should be delivered up to him as her guardian. The court at first doubted whether they should go any further than to see that she was under no illegal restraint, and took time until the next day to look into Mrs. Turberville's case, and then declaring that this being the case of a young child, who had no judgment of its own,

they ought to deliver her to her guardian, who took possession of her in court. *Rex v. Johnson*, 1 Strange, 579.

363 The third case (and these then are the cases from which the authorities date) was that of *Rex v. Penelope Smith*, 2 Strange, 982. The court laid down the doctrine, that the court could only deliver from illegal restraint. It declares Johnson's case above overruled, and says Lord Raymond repented of what was done in that case. Lord Mansfield (3 Burr, 1436) says: "This case (*Rex v. Smith*) was determined right, for the court were certainly right not to deliver the child to the father." He also says (which does not appear in the report of the case), that the court had "a bad opinion of the father in taking the child." *Vide* Lofft Rep., 748.

In the next great case on record, that of *Rex v. Deleval*, 3 Burr, 1434, Lord Mansfield reviews *all these decisions*, and says they are all right. He objects, though, to the dicta contained in them, especially those in the latter decisions, which overrule *Rex v. Johnson*, and establishes that case (though some modern cases seem to have overlooked it) upon firm foundations, by expressly commending the decision. 3 Burr, 1436. He also lays down the true principle, which harmonizes all the cases, viz., "*the court are to judge of the circumstances of the particular case and give directions accordingly.*"

Since this decision of Lord Mansfield, the current of judicial authority has flowed on in the channel marked out by him. Yet almost all the modern cases seem to speak of *Rex v. Johnson*, as overruled both by *Rex v. Smith* and *Rex v. Deleval*. (The case in Burr referred to.)

The following cases are all decided rightly under the principle laid down by Mansfield, and many of them refer to him for authority; but the dicta in some of them are erroneous, owing to mistaken impressions remaining with the judges, respecting the relative position of the cases, *Rex v. Smith*, and *Rex v. Johnson*. According to *Rex v. Deleval*, both were right. 4 Johns. Chan. Rep., 80; 2 Cox, 242; 8 Johns., 388; 5 Binney, 520; 13 Johns., 418; 3 Mason, 428; 6 Greenl., 467. These are all professedly decided under the authority of the cases above cited.

The burden of proving the father absolutely unfit to take charge of his child, rests upon the opposite party. In 3 Mason, 428, Judge STORY says, "the presumption of law is, that it is the interest of the child to remain with the father." But the leading case on this point is that of *The King v. De Mannerville*, 5 East., 219. There it was decided that the father of the child is entitled to the custody of it, though an infant at the breast of its mother, if the court sees no ground to impute any
36 motive injurious to the health or liberty of the child. Lord Ellenborough says, "It lies with those who applied for the writ to show that the father was not entitled to the custody of the child. He drew no inference to the disadvantage of the father. *But he is the person entitled by law to the custody of the child.* If he abuse it, the court will protect the child."

LAWRENCE, J., is reported to have said, in this case, that where Sir William Murray applied to obtain possession of his child, five years old, from its mother, Lord Kenyon had no doubt but the father was entitled to the custody of the child, unless the court saw he had a design to abuse his right by sacrificing the child. (See the case 5 East., 220.) The last case to which we refer, is that of the *Com. v. Wales Briggs*, 16 Pick., 220.

Shakerism is no ground for denying this man the custody of his children. The statute (Swan 853) does not embrace him within its pro-

visions. And in this manner the constitutional rule applies, "No preference shall be given to any religious society or mode of worship." Cons. of Ohio, art. 8, § 3. Shakers are to be regarded in the same light with other Christians. 3 Greenf., 242. Shakers are competent witnesses in this case. 6 Greenlf., 57, 3 Greenlf., 243; and in *Wells v. Lane*, 8 John., 462, in a penal action, it was held that one Shaker could testify for another without a release.

Collins & Warder for the respondent contended: That the right of the father to the possession of his minor children is not an absolute right. But, on the contrary, when he applies to a court of justice to enforce it, there is a sound discretion vested in the court to grant or refuse it. And the court, in exercising this discretion, will chiefly regard the *interests and welfare* of the children.

The elementary books, in express terms, assert the proposition, that there is a discretion in courts of justice to control the rights of a father to the possession of his children. *Vide* 1 Chitty, Gen. Prac., 64; 2 Kent Com., 204, 205.

In England all the decisions prior to our own revolution, declare the same doctrine. And, in a question of this kind, we insist that the prior authority must control.

In *Rex v. Smith*, 2 Strange, 982 (A. D. 1735), a boy of thirteen or fourteen years of age, in the custody of his *aunt*, was brought up on a *habeas corpus* sued out by his father. It was held by the court, that they could only deliver the boy out of the custody of his aunt, and inform him he was at liberty to go where he pleased. He chose to remain with her.

In *Rex v. Deleval*, 3 Burr, 1434 (A. D. 1764), Lord Mansfield thoroughly examined the cases that had been adjudicated and concluded. 366 "The rule is, that the court are to judge upon the circumstances of the particular case, and to give their direction accordingly." S. P. in *re Blisset* Lofft Rep., 748 (A. D. 1774).

In 1804, however, the decisions in England took a different direction. They still maintained that the right of the father might be controlled where the child had property in its own right. 2 Bligh Rep. N. O., 124; 2 Russ., 1; 1 Jacob, 245; 4 Cond. Eq., 115. But they refused to extend the principle farther. The result was, that a girl seven or eight years old might be torn from the custody of a mother or aunt, and entrusted to the paramour of her father. This disgraceful condition of the English law was bewailed by her jurists and legislators. The court is referred to the remarks of Lord Denman (49 vol. Parl. Deb., 494), and of Lord Lyndhurst (44 *id.*, 3d series, 174), cited in the argument of Senator Paige, 25 Wend., 104, 105. The result was that Sergeant Tal-
fourd, to his immortal honor be it said, in 1839, by act of Parliament, restored the pristine humanity of the English law.

But we are not embarrassed by any serious conflict in the whole current of American decisions. We are not able to find the proposition anywhere controverted. Even where the right of the father is asserted, the power of the court is also asserted, and the particular circumstances of the case proved him to be the proper custodian of the child. 6 Greenlf., 462. The defendant was the grandfather; the relator was the father. *Per* PARRIS, J.: "From an examination of these authorities, I consider the law well settled, that it is in the sound discretion of the court, to alter the custody of these minor children or not, and that the father cannot claim them as a matter of right." The application was re-

fused. 6 Mass., 272; 10 Pick., 274; N. Y. 4 Johns. Ch. Rep., 80; 8 Johns., 328; 13 Johns., 418; 18 Wend., 640; 19 Wend., 16. The leading case is *Mercein v. The People*, 25 Wend., 64; *vide* Sen. Paige's argument, *ib.*, 105. We cite also the celebrated case of *D'Hauteville v. D'Hauteville*; 5 Binney, 520; 1 Serg. & Raw., 356. In the circuit court of the United States, 3 Mason, 482, Mr. Justice STORY specifically asserts that he will look to the interests of the children, and thereby determine their custodian. The same principle is recognized in France, Civil Code, 444. We cannot forbear pushing the principle of the relator's counsel to its conclusion. They assert that our legislature has no right to make any religious principle a ground for the loss of any civil privilege. We admit that a man, under our constitution, may embrace
 366 any belief, and follow any religious worship whatsoever, *provided it works no injury to the state*. Otherwise the Thugs of India might, in Ohio, train up their children to the religion of assassination. The Hindostan woman might (if transplanted here) claim to sacrifice her babe to some god of the river, or to throw herself upon the funeral pyre of her husband; while another species of fanatics might claim the privilege of being crushed under the car of Juggernaut.

True, we attribute no such monstrous superstitions to the Shakers. But we claim that if Shakerism, or Catholicism, or any other ism results in a policy adverse to the whole genius of our institutions, *pro tanto*, it may be controlled.

Population is the basis of all society and government. One of the chief ends and aims of the constitutions and laws, is to foster and protect the increase of population. Hence, whatever tends to destroy this increase, is contrary to the policy both of the laws and the constitution. For this reason, conditions annexed to gifts, legacies and devices in restraint of marriage generally, are void, and the gift is to be enjoyed freed from the illegal condition. *Vide* 1 Story Eq., p. 286, section 280 *et seq.*, and the numerous cases there cited. We, therefore, submit, that it would be alike impolitic and contrary to the fundamental idea of our constitution, and all constitutions, that children of such tender years as these, should be placed in a community to be taught that marriage is a sin, and the natural increase of man an evil.

JOHNSTON, J. There is, perhaps, no principle of the law better settled than this, that the father has a right to the custody of his own children, to protect, feed, clothe, and educate them in his own way. •

But this right is conventional, and not natural. By the laws of nature, and the analogy of animal economy, the offspring belongs to the mother; and as to all natural children, where there is no responsible father, the law gives the custody to the mother. But in all civilized countries, the father is by law responsible for the expense of protecting, feeding, clothing, and educating all his children born in lawful wedlock. Out of this obligation, so to provide for them, and correlative to it, arises his right to the custody. But separate from the duty of providing, the right to custody does not exist.

Hence arises the exception of the general rule—that when the father is a grossly immoral, intemperate, imbecile, insane, or otherwise disqualified to discharge the obligation of providing, the law will not enforce the right of custody.

367 This suggests the very delicate question, whether Stephen Ball, the father of these little girls, is so disqualified for the task, as to put him without the pale of the general rule of law, and bring him within the

exception. That he is immoral or intemperate, no one pretends. But it is claimed that by his acts and words, and by his connection with the people called Shakers, he has abjured "natural affection;" and that he seeks these children, not to protect, and feed, and clothe, and educate them as a father, but to proselyte them to the peculiar faith, and place them under the care of the Shakers.

At the time these children came to the custody of the defendant, it is pretty clear that he was laboring under mental, if not moral hallucination, carried by religious phrenzy beyond the dominion of reason, so as to expose himself to the withering denunciation of a christian apostle, "if any provide not for his own, and especially for those of his own house, he hath denied the faith, and is worse than an infidel." Deserted by the father, and paternal grandfather, the paternal grandmother, straitened in her means and sinking under ill health, brought these orphans to the maternal grandmother, who took them under her care, and, it is admitted on all hands, has provided well for them ever since. As matters then stood, nobody would have disputed her custody of these children.

But it is said that Stephen Ball is now reclaimed from his wanderings, and is willing and able to provide for them, and that to this end he seeks their custody. If this be true to the uttermost, there is no law can stand betwixt him and them.

Let us inquire into his present situation as a member of the society of Shakers.

As a general thing, I have a very poor opinion of all common property communities, from that formed on the plains of Shinar 4000 years ago, down to the latest phalanx of Fourierism. Their objects may be benevolent, but their tendency is to degenerate and demoralize man. Against this particular community, I have no prejudice. In their favor much may be said. For industry, cleanliness, economy, quiet and orderly behaviour, they are patterns well worthy of imitation: and for a numerous class of persons, soured by disappointment, or crushed by misfortune, or who, by the vices of youth, or the frosts of age, have extinguished or outlived the genial impulses of nature; such communities afford an asylum, not only beyond the reach of want, but beyond the reach of scorn, where they may spend the evening of life in monotonous tranquility, and comparative happiness. That young people, 368 whether brought up in or out of the community, are likely to embrace "the doctrines of the cross," as they use the term, I have no serious apprehensions.

With the peculiar faith of the sect, I prefer having nothing to do, further than it affects the present case. Suffice it then, that they abjure all "natural affection," and denounce the marriage relation, from whence the objects of natural affection spring, as sinful; so that the relation of parent and child exists not among them. The love of the father and the fondness of the mother give place to the vigilance of the "care-takers."

Suppose, then, that these little girls were delivered over to this plaintiff, and according to his avowed purpose, he should take them with him to the Shaker community, to be protected, fed, clothed, and educated in this peculiar way; what would be the relation between him and them? The bonds of "natural affection" would be cut asunder, to be supplied by the mystic, may I not say the metaphysical tie of universal philanthropy, and the endearing relation of father and daughter dissolve in the cold and distant relation of fraternal brother and sister.

That the ordinary wants of these children would be well supplied in this community, I do not doubt; but not one of these wants would be supplied by Stephen Ball. The testimony shows that he is without means and without credit. He has no means to provide for these children, but the means of the community. He has no bread for them to eat, but the bread of the community. He has no clothes for them to wear, but the clothes of the community; and over their education the "female care-takers," and not Stephen Ball, would preside.

True, as the witness informs us, he would have the privilege of visiting them; the same privilege that he would have of visiting every other man's children, and that every other old man would have of visiting his. But he would visit them only to see the "care-takers" control, discipline, and instruct them, not according to his will, but according to the will of the community.

True, as the same witness tells us, he would be allowed to take them away. But this is the privilege the law gives him, and which the courts of justice would enforce, whenever he desired to carry them to a home of his own.

True, as the same witness tells us, the girls, when they arrive at the age of majority, would be allowed to go away if they did not choose to stay; and I desire to know by what authority they could be restrained of this liberty in our country.

Substantially, then, the community of Shakers is plaintiff to this suit; because the object is to transfer the custody of the children from Mrs. Hand to the care-takers of the community.

True, Stephen Ball is the relator, and nominally the plaintiff; but he does not seek these children that he may rekindle the fire on his desolate hearth, and relink them around it in the family circle. He does not seek them that he may rebuild his family altar and unite with them in consecrating it with prayers and songs of family devotion. He seeks them that he may sever them from the bosom of their grandmother, and from his own bosom, and plant them in the cold ascetic bosoms of the "female care-takers," and transfer all his right, title and interest in the children which God has given him, to total strangers.

All this might be done by an honest man, and a pure man. But can it be done by a sane man? Does it not argue, at least, a morbid state of the amative and philoprogenitive faculties, bordering on insanity, and totally inconsistent with a rational discharge of parental duty?

Besides, there is some consideration due to the grandmother of these children, who has them in custody. When they were houseless, she took them to her house. When Providence took away their mother, and their father forsook them, she took upon her the duties both of a father and a mother to these orphans; and how faithfully she discharged both, is abundantly proved. If they were domestic animals merely, she would have a lien on them which the claimant would be bound to discharge before he took them away. As it is, she has a sort of moral lien, which I am unwilling to disturb, till I am satisfied that the father has again "put on the bonds of natural affection," and recognizes in his own right the correlative obligations and rights of a father, and the natural relations of parent and child.

The custody then of these children, must remain where it is for the present. The children are too young to choose themselves a home, and the new home proposed for them, is one to be adopted only upon the freest choice.

This conclusion I come to with great difficulty; not that I had any doubts as to what was best in the present case, but because I was very loath to make a decision which looked toward unsettling the well established right of the father to the custody of his children.

ATTACHMENT.

405

[Supreme Court of Ohio, Hamilton County, May Term, 1848.]

Before Judges Read and Hitchcock.

FEIDLER V. BLOW, OWENS AND GALLESPIE.

Held, that where a writ of attachment issues against the joint property of three defendants, the separate property of one cannot be attached.* That where a garnishee is called upon, by proceedings in attachment, to perform the contract made with the defendant, he is only bound to pay to the attaching creditors that which, by the contract, he was bound to pay to the defendant.

Certiorari: Plaintiff sued out of the superior court of Cincinnati a writ of attachment against the joint effects of all the defendants, and also process against Samuel Wiggins as garnishee. The sheriff found no property, but summoned the garnishee. Wiggins, in his answer, denied his indebtedness to the defendants. He stated that in 1842 he bought of Owens & Gallespie a lot of dry goods, and agreed to pay for them on 1st September, 1844, \$7,500 in the paper of Owen & Gallespie, or the paper of defendants. Plaintiff made publication of the issuing and return of the writ; filed his declaration; entered defaults against defendants, and subsequently moved for judgment.

V. Worthington moved to dismiss the proceedings for want of jurisdiction.

Storer & Gwynne, for Plaintiffs, *contra*.

The superior court sustained the motion, and this writ is prosecuted to reverse that judgment.

HITCHCOCK, J. Where two or more are jointly bound, or indebted, the statute authorizes a writ of attachment to issue against the separate or joint estates, or both, or any of them, but in this case the writ issued against the joint property only.

The writ did not authorize the attaching of the separate property. As no joint property or effects were found, we cannot say that the superior court erred in this particular.

The garnishee's rights are not affected by this statute. His indebtedness to the defendants is to be paid in the same manner as if paid direct to the defendant. If ready in this case to pay in the paper of the defendants, he could not be compelled to pay in anything else, and such payment could not avail the plaintiff anything. 406

We think the superior court did not err in dismissing the proceedings for want of jurisdiction.

**Vide Winchester, Irwin & Co. v. Pierson & Co.*, 3 Western Law Journal, 133, where this point is ruled the same way.

EVIDENCE.

[Supreme Court of Ohio, Hamilton County, May Term, 1848.]

Before Judges Read and Hitchcock.

ROGERS AND OTHERS, PLAINTIFFS IN ERROR, v. TURNER AND KENNEDY, DEFENDANTS IN ERROR.

Competency of witness—Interest.

Where the witness offered by the plaintiff, in a conversation with the defendant, claimed that he had been injured by the defendant in the same manner as that claimed by the plaintiff, and the defendant told him that if plaintiff's suit was decided in favor of plaintiff, he would pay the witness without suit: *Held*, that the witness was competent.

ERROR to the superior court of Cincinnati. Turner & Kennedy sued Rogers & Brothers in the court below, to recover damages occasioned by a collision of their coal boat with the steamboat of Rogers & Brothers. To support their case, they introduced a witness who stated that on the night of the collision between the plaintiffs' and defendants' boats, he, the witness, was navigating a flat boat down the Ohio river, opposite Cincinnati, and that a collision occurred between his boat and the defendants' boat, by which his boat and her load were sunk and destroyed; that he afterwards went to the office of the defendants and claimed pay for his boat and cargo; that a son of one of the defendants said a suit had been brought by the present plaintiffs, and if it should be right that they should pay for the boat they would pay for it—that if this suit was decided in favor of the plaintiffs, they would pay the witness for his boat without suit; and if the plaintiffs recovered in this suit, he, the witness, expected the defendants would pay him without suit, if they were men of their word; that he expected this suit to decide whether it was right for them to pay for the flatboats or not.

The defendants objected to this witness, claiming that he was incompetent on account of interest. This objection was overruled, and the 407 witness permitted to testify. The defendants excepted to this ruling of the court. Judgment being entered for plaintiffs, the defendants prosecuted this writ of error.

Fox, for the Plaintiffs in Error, cited *Forrester v. Pigeon*, 3 Camp. Rep., 380; 1 Greenleaf on Ev. S., 392, 395.

Taft, for Defendant in Error.

READ, J. If the witness and the defendants, at the time of the conversation, set forth in the bill of exceptions, made a contract by which his claim against the defendants was to abide the result of this suit, the witness was incompetent; if the conversation did not amount to a contract, then he was competent. This is a question about which, perhaps, there may be, in the minds of some, some doubt. We have arrived at the conclusion that it was not a contract, and that, therefore, the witness was competent. *Judgment affirmed.*

DOWER.

413

[Supreme Court of Ohio, Hamilton County, May Term, 1848.]

Before Judges Read and Hitchcock.

EDWARD TUITE V. WILLIAM MILLER.

A claim of dower is embraced by the covenant of general warranty.

An assignment of dower by a certain share of the rents and profits made a charge on the land and enforced by an order for its collection, is equivalent to an actual eviction of one-third of the land by an assignment by metes and bounds, and putting the widow in possession.

After the decision in 10 Ohio Rep. 382, Tuite brought an action of covenant, in the superior court of Cincinnati, which was taken by appeal to the supreme court. The case was submitted to the court, and the facts, as agreed and understood by the parties, were briefly these:

On the 28th of April, 1836, Miller conveyed to Tuite, in fee simple, a lot in the city of Cincinnati, and in the deed covenanted that he was the "lawful owner of the premises, and had good right so to sell and convey the same;" and also that he would "warrant and defend the same against all persons whomsoever."

Elizabeth Satterthwaite filed her bill in the common pleas, setting up a right of dower on the lot prior to the date of Miller's deed, and at November term, 1838, obtained a decree of the court, establishing her right. And it being ascertained that the dower could not be assigned to her by metes and bounds, a valuation was returned, and the court finally decreed that Tuite pay her \$62.38 for her dower up to that time, and pay the further sum of sixty-six dollars a year thereafter, during her natural life, payable half yearly, in May and November. This was made a charge upon the lot, and in default of payment of any part of it, the sheriff was ordered to sell so much of the lot as should be necessary to raise the sum due. An order issued, and the first sum due was paid to the sheriff, with costs, amount to \$87.86, without levy or sale. Tuite paid the other installments as they fell due, without further order.

The case, after having been argued several times before the supreme court in the county, and in bank, was again heard at this term.

Gholson & Miner, for Plaintiff.

A. N. Riddle, for Defendant.

HITCHCOCK, J., delivered the opinion of the court. There was no doubt, he said, but that the claim of dower was covered by the covenant of general warranty contained in the deed. The doubt in the case had been whether the facts showed a sufficient eviction to enable the plaintiff to maintain the action.

There must, he said, be an eviction or something equivalent. The regular mode of assigning dower was by metes and bounds, and putting the widow into possession of the part so assigned. Had this been done, it would, without doubt, have been an actual eviction.

The statute provided that when dower could not be conveniently assigned by metes and bounds, it might be assigned in a special manner, as of a third part of the rents, issues and profits. The manner of assign-

ment, then, was in the discretion of the court; and any special mode adopted by the court should be considered as equivalent to the regular mode, and substantially an eviction.

The recovering of the plaintiff was not to be limited to the amounts he had actually paid under the order of the court, but he was entitled in addition, to the value of the incumbrance, to be calculated according to the tables of annuities, not exceeding one-third of the consideration money and interest since the eviction. And judgment was rendered accordingly for the plaintiff.

459

PROMISE TO INDEMNIFY OFFICER.

[Supreme Court of Ohio, Lawrence County, April Term, 1848.]

Before Read and Avery, Justices.

A. T. COMPSTON v. WILLIAM LAMBERT.

A promise made by a justice of the peace to indemnify one against the consequences of aiding in the arrest or detention of one under a void process, is void as against public policy, though the party was ignorant of the character of such process.

A promise made by a public officer claiming to act under a legal process, to indemnify one against all loss in case he will aid in enforcing the execution of the same, is void—though it turns out in the end that such process was void, and the parties liable as trespassers in enforcing it.

When a justice of the peace, claiming that a constable had a warrant, issued by himself, to arrest a person, and detain him in custody, requested a bystander to assist in the execution of such process, and such bystander did render such assistance, on the promise of such justice to indemnify him against all damage therefrom, and it turned out that such process was void, whereby said bystander was rendered liable in trespass to the party arrested, and was compelled to pay damages and costs, it was held that such bystander could sustain no action on such promise of indemnity against said justice.

This was a writ of error to the common pleas for this county. The action below was assumpsit on a special promise of indemnity. The declaration consisted of numerous counts, varying the statement of the promise. The first count averred that the defendant was a justice of the peace, and as such justice did assume and pretend to have authority as such justice legally to direct and command the arrest and detention of one William Razor, who was then present before him as such justice; that said defendant, pretending to have such authority, did direct and command the plaintiff with others to arrest and detain in custody said William Razor; that the plaintiff and others under such command, and the belief that said defendant had such power and authority to issue said command, had there and then arrested the said William Razor; and that one John Razor then and there endeavored to rescue the said William from custody; whereupon the said defendant commanded the plaintiff to seize said John Razor, and prevent the rescue of said William; and thereupon, in consideration that the plaintiff would, at the special instance and request of said defendant, obey and perform said command, so issued, and seize and lay hold of said John Razor, and endeavor to prevent such rescue, the defendant undertook and promised the plaintiff to indemnify and save him harmless from any loss or dam-

age for or by reason of the seizure and detention of said John Razor. 460 The plaintiff further averred that, believing in the authority of said defendant to issue said command, and that the arrest of said William Razor was lawful, he did seize said John Razor, and prevent him from rescuing said William. The plaintiff then averred that defendant had no such authority, and that the arrest of said William was illegal, all of which was unknown to the plaintiff. The count then set out a suit by Razor against him—judgment and a payment thereof as damages sustained by plaintiff in obeying said command.

Another count averred, that the defendant was a justice; that one Sherman was a constable and pretended to have a *ca. sa.* issued by said defendant for the body of one William Razor, and that by virtue thereof, he, the said constable, had arrested the said William, and detained him in custody; and that one John Razor endeavored to rescue said William from the custody of said constable; whereupon the said constable commanded the plaintiff and others to aid him in preventing such rescue; and that the defendant, in consideration that the plaintiff would so aid said constable in preventing said rescue, assumed and promised to indemnify plaintiff against all loss or damage. The count then avers that the constable had no such authority—ignorance of this fact on the part of the plaintiff, and damages sustained as in the other count.

Another count set forth that in consideration that the plaintiff had done the acts above stated, at the special instance and request of the defendant, that the defendant assumed and promised to indemnify him against all loss and damage sustained by reason of so having acted at the request of the defendant. Then followed the averments of want of authority in the justice and constable, ignorance of that fact on the part of the plaintiff, and the suit, judgment, and payment, as damages.

Another count laid the promise to have been made by defendant, if plaintiff would assist the constable in arresting the said William Razor, under a process which the constable pretended to have.

Another count averred that the defendant pretended to have the authority to direct the arrest of William Razor, and that the plaintiff, on a promise of indemnity, made by defendant, did aid in making the arrest. The other averments were the same as in the first count.

To this declaration there were interposed separate demurrers to each count. The court below sustained the demurrers to all the counts, and rendered judgment thereon for the defendant. To reverse this judgment, the writ of error was prosecuted.

Wheeler for plaintiff. The declaration contains two classes of cases—one on an *executory*, and one on an *executed* consideration. As to 461 the first class, he contended that there were exceptions to the rule, that no promise to indemnify one against an illegal act, could be valid. He insisted that where the plaintiff was ignorant of the illegal character of the act, the promise was good. *Espinasse* N. P., 91. *Chitty* on Contracts, 503-678, note 2; *Bathurst* N. P., 136; 4 A. Jur., 274; 17 T. R., 144; 16 Mass. Rep., 334. The case most relied upon was that of *Fletcher v. Harcourt*. *Winch.* Rep., 48, cited in 1 Bacon Abr., 274; *Chitty* on Contracts, 503; 4 A. Jur., 258, 276. That case was this: If A bring B to a common inn, of which C is host, and affirms to C that he hath arrested B by virtue of a commission of rebellion, and in consideration that C will detain B for the night, promises to indemnify C, *Held*, that action could be sustained on the premises.

As to second class, he claimed that a promise on an executed consideration did not come within the rule. One may indemnify himself against the consequences of a past illegal act. Chitty on Contracts, 678, note 1; 14 T. R., 381; 4 A. Jur., 251. He instanced the case of bonds given for past cohabitation.

Nash, for defendant, claimed that it would be contrary to public policy to hold such a promise binding. 'It would impede public officers in the discharge of their duty, if those called upon to aid them, could legally insist upon a promise of indemnity before consenting to act. It was their duty to obey the call of a known officer, in the execution of process, the suppression of riots, etc. They may probably require the authority of the officer to call upon them for aid to be produced; and each must decide for himself as to its legality. If they refuse to render assistance, they are liable to punishment, provided the officer had legal authority to make the demand. If they do not call for the authority, it is their own fault. As to right to call for authority of officer, *Vide* 9 Coke, 66, B; Mackally's case, 18 Mass. Rep., 323; 1 Hayward Rep., 471; 10 Wend. R., 514; 2 Iredell R., 201; 2 Hill R., 87; 3 Chitty G. Pr., 358.

A contract to indemnify or pay one for doing his duty, for performing an act the law requires him to perform, is void. 1 Leigh N. P., 39; 2 Burs. Rep., 924; 2 Camp. Rep., 317; Pick. Rep., 72; 1 B. & A., 950; Addison on Contracts, 22; 1 Caine's Rep., 104; 1 Comyns Dig., 326 (F., 462 7); 12 Ohio Rep., 281. It was the duty of plaintiff to obey the call. Swan Stat., 241, § 53-244, § 68-856, 537, 541, § 25; 5 Wheat. Rep., 437.

A promise to indemnify one against an unlawful act, or the commission of a crime, is void. 2 Evans' Poth. on Obl. 2 Comyns on Contr., 59; Hutt., 56; Bul. N. P., 146. The act in this case was a *known unlawful* act, to commit an assault and battery.

The exceptions to this rule relate exclusively to disputes to a title to property. If two men claim title to same property, and one promises to indemnify another in assisting to enforce his right, the promise is binding, though, having no title, the act was a trespass. If the promisee *knows* the act is a trespass, then he cannot enforce it. 14 Pick. Rep., 174; 9 Cowen Rep., 154; *Stone v. Hooker*, 3 Hill R., 170; 2 Johns. Cases, 54; 14 T. R., 381; 17 do. 142; *Ives v. Jones*, 3 Iredell Rep., 538.

The cases cited by Mr. Wheeler all come within this exception, save that of *Fletcher v. Harcourt*. This case differs from the present, and cannot be forced as an authority to support it. He, however, doubted the law of the case; and, by reference to 1 Bacon Abr., 274, it would be seen that the case was entitled to very little respect as an authority. HOBART, C. J., doubts, and finally acquiesces on the ground that, after verdict, it would be presumed that the arrest was legal. Most of the writers on *Nisi Prius* do not refer to the case at all, such as Selwin, Leigh, etc. The case is against the soundest legal principles, and at least should govern only in a case running on all fours with it.

As to the executed consideration, he contended that an *illegal* consideration could not be the basis of valid promise. No such case could be found. As to cases of past cohabitation, those were cases of bonds, which needed no consideration to support them. The court only refuse to set them aside. But such a consideration will not support an assumption. Addison on Contr., 20; 4 B. & A., 650; 9 M. & W., 501.

AVERY, J., said that the principles involved in the case were very important ones, and demanded much consideration before the court could sustain this action. We would reserve the case for decision in bank, if we did not think it was putting the defendant to more expense than he ought to be put to. As it is, we must affirm this judgment. No case can be found that goes as far as this case does; and we do not think that public policy would justify us in subjecting a public officer to such an action as this. If counsel wish to have the opinion of the whole court, they can obtain it at its next term in bank, on an application for a writ of error. We wish they would present the record for the allowance of such a writ.

CANALS.

463

[Supreme Court of Ohio, Washington County, April Term, 1848.]

ERROR.

Before Read and Avery, Justices.

THE STATE OF OHIO V. TRUXTON LYON.

The owner of any boat or float, navigating any of the canals, etc., of this state, is personally liable for any penalty or forfeiture incurred by the captain or hands in navigating such boat or float.

Nor is any demand upon such owner necessary before suit can be brought against him.

The receipt by a collector of single tolls, after the defendant has become liable to pay double tolls, does not bar the right of the state to recover the balance of such double tolls.

A collector of canal tolls has no authority to release any penalty incurred by any person under the canal laws.

The case below was an action of debt, to recover double tolls for one in employ of defendant, having navigated a float of his logs on the Muskingum improvement, without first having paid the tolls therefor, and obtained a permit for so doing from the collector at Point Harmar. The declaration averred the ownership of the float by defendant, the navigation of it by one Corey, without having first paid the toll and obtained a permit, and that the double tolls amounted to \$109.38, and concluded by demanding payment of \$54.69, the said defendant having paid the like sum, being single tolls—thus leaving only the penalty due to the state. To this declaration a demurrer was filed; and the court below sustained the demurrer. To reverse this judgment, this writ of error was prosecuted.

Nash, for plaintiff, contended that the reception by the collector of the tolls, did not release the right of the state to double tolls. The collector has no authority to release a right once vested in the state. A public agent has no authority to release a right, unless specially empowered. 7 Cranch Rep., 366; *United States v. Lyman*, 1 Mason Rep., 432; *Martin v. United States*, 4 Monr., 487. In *qui tam* actions, the plaintiff has no authority or power to release the moiety belonging to the state without absolute payment. 9 Pick. Rep., 44; 9 T. R., 251; 11 T. R. R., 474; 1 Bacon Abr. G., 71.

Goddard & Whittlesey, for defendant, contended that the declaration was insufficient. 1. Because it was against the *owner* instead of the

464 person who had charge of the raft. The declaration shows that defendant did not navigate the float or raft. The owner ought not to be liable for the neglect of his captain. 2. The action is brought for the penalty only. We contend that a receipt of the tolls without protest is a bar to the action for the penalty. It is like a case of damages on a protested bill. The receipt of the principal extinguishes the right to the damages. 5 Greenlf., 174; 13 Wend., 689; 15 do., 76; 1 Metc., 156. The declaration adopts the receipt of the tolls by the collector; hence his right to do so is admitted. 3. There is no averment of a demand. 4. There is no allegation of a forfeiture by the master.

Nash in reply stated, that the 120th section of the act decided the first objection by making every owner, part owner, and the boat, etc., severally liable for all penalties and forfeitures incurred by the master, and hands in navigating the canals, etc. Swan Stat., 196. The forfeiture is then on the part of the owner as much as master. This shows that no demand is necessary.

READ, J. We think the declaration is sufficient, and shall reverse this judgment. The statute renders the owner and boat or float severally liable for the acts of the master; and we think this must be an assignable liability, a liability to which the state has a right to resort in the first place; and the averments that the defendant owned the raft, and that it was navigated by the person in charge in such manner as to incur a penalty, are sufficient to enable the state to sustain this action against the defendant. Nor do we think the second objection can be sustained. When the act has been done in violation of the statute, the right to demand double tolls became a vested one in the state; the defendant became indebted to the state in the sum of \$109.38, and nothing but payment could cancel this indebtedness. The payment of single tolls could operate only as a payment of so much of the indebtedness. The collector has no power to release the debts of the state; his business is to receive payments, not to release rights. Public agents have no powers except such as are expressly given them; and a power to receive cannot include a power to release. Neither do we think any demand is necessary. The duty of the defendant is to pay the tolls in advance; and failing to pay the tolls, he becomes liable, and is bound to pay double tolls. This duty exists as much before as after a demand.

465

OCCUPYING CLAIMANT.

[Supreme Court of Ohio, Washington County, April Term, 1848.]

Before Read and Avery, Justices.

ROBINSON'S LESSER v. NAHUM WARD.

A deed executed by executors under a power of sale, after reciting that the testator had been the owner of certain described tracts of land, conveyed said tracts of land, subject to all sales for taxes or otherwise, it being the meaning and intention of this conveyance to quit-claim all such right and title as the heirs of the testator had in and to said lands. It was held that such deed did not *purport* to convey lands, which the testator had conveyed in his lifetime, and was not, therefore, such as would entitle the grantee under it to the benefit of the occupying claimant law against those claiming title under the testator himself.

Where one purchased wild lands, ignorant of a prior unrecorded deed, conveying a better title to another, but, before taking possession thereof, was informed of

such deed, and yet took possession and made improvements, he will not be entitled to pay for such improvements under the statute for the benefit of occupying claimants.

To bring an occupant within the statute, both the title and possession must be obtained without fraud.

Taking possession after notice of a prior unrecorded deed, conveying a better title to another, is not a possession obtained without fraud.

The case below was an application on the part of Ward for the benefit of the occupying claimant law, in a suit of *Robinson's Lessee v. Ward*. The bill of exceptions showed that Lebbeus Loomis was the owner of two shares of land in the Ohio Company's purchase, and that in the year A. D. 1831, the said Loomis conveyed the premises in controversy, being a part of one of said shares, to one Wm. Trull, under whom the plaintiff in ejectment, by sundry mesne conveyances claimed. This deed was not recorded until October 7, 1839.

The said N. Ward offered in evidence a deed from the executors of Lebbeus Loomis to himself for the said two shares of land, dated December, A. D. 1836, and recorded March 8, 1837. This deed, after reciting that the said Lebbeus Loomis was the owner in his lifetime of two shares of land in the Ohio Company's purchase, containing the following lots and parcels of land, to wit, setting out the lots by number, etc., conveys to said Ward all those lots or rights in the Ohio Company, subject to all sales for taxes, or *otherwise*—it being the meaning and intention by this conveyance to quit-claim all such right and title as the heirs of Loomis have in and to said shares.

The bill of exceptions further showed, that the plaintiff in ejectment proved, that at the time said Ward received the said conveyance, the premises were wild and unimproved lands, and that before said Ward took possession of said premises, and made the improvements, payment for which was now claimed, he was informed by Douglas 466 Putnam, that Loomis, in his lifetime, had conveyed this tract to said William Trull, Jr., and that the plaintiff's lessors were then the owners of the same.

The court below decided that on this evidence Ward was entitled to payment for his improvements so made; and to reverse this judgment, this writ of *certiorari* was prosecuted.

Nash, for the plaintiff, claimed that the judgment must be reversed for two reasons:

1. That Ward had no such *title* evidenced by deed as the statute requires; because the deed from the executors of Loomis did not purport to convey the lot in controversy. The deed only conveys such right and title as the heirs of Loomis have in the two shares, subject also to all sales for taxes, or *otherwise*. Here the intention is plain, and that must govern. 19 Pick. Rep., 445; 15 do., 23; 1 Mass. Rep., 219; 4 do., 135; 6 do., 24; 7 do., 381; 16 Pick. Rep., 435. General words may be restricted by subsequent words. 13 Maine Rep., 430; *Thorndike v. Richards*, 14 do., 387; *Allen v. Allen*, 4 Mass. Rep., 196, 205.

2. That having received notice of the prior unrecorded deed to Trull, before he took possession, the taking possession after such knowledge, and making improvements, were a fraud upon the rights of plaintiff's lessors. To entitle him to improvements, he must have *obtained title to and possession of the premises, without any fraud or collusion on his part*. *Vide* Swan's Statutes, 606. Here Ward took possession after he knew he had *no title*. This was obtaining the possession with

fraud. *Vide Singleton v. Jackson*, 2 Litt., 208; *McKinley v. Halliday*, 10 Yerg. R., 477; 2 U. S. Dig. Supb., 276; 2 U. S. Dig., 726, § 356.

Goddard & Whittlesey, for defendant, contended, that the statute provided for cases of notice, "actual notice by the commencement of the suit." All improvements made prior to such notice may be allowed.

2. That there was no fraud here. Ward's deed was dated December 26, 1836, recorded 8th of March, 1837. The land was vacant at the time, no one even paying the taxes. Ward did not at the time of his purchase know of plaintiff's title. He denied that the information given Ward by Putnam, was such as he was bound by. Was Ward to lie by and abandon land on such information?

467 AVERY, J., delivered the opinion of the court—holding, that under the deed Ward got no conveyance of the land. The deed conveyed to him only so much of the two shares as the heirs of Loomis had a right and title to. To this tract the heirs of Loomis had no right or title, and of course the deed expressly excluded the tract from its operation.

As to the other point, the court held, that possession taken, after notice of a better outstanding title in another, was not a possession obtained without fraud. The statute intended to provide payment for such improvements as were made in the honest belief that the occupant was improving his own land. Not only the title, but the possession must be obtained without fraud. Now, to take a deed of land with knowledge of title in another, would be too palpable a fraud to admit of doubt; and yet what would be fraud in obtaining the title must be equally so in obtaining the possession.

The court reversed the judgment, and dismissed the application.

CHANCERY ACT.

[Superior Court of Cincinnati, June Term, 1848.]

ANONYMOUS.

Held, that under the act of February, 1848, to amend the Chancery Act, an injunction may be granted restraining the defendant in the suit at law, from any disposition of property in his own possession.

IN CHANCERY. The bill alleged the indebtedness of the defendant to the petitioner; that a suit at law had been commenced by the petitioner against the defendant to recover the debt—naming the court, setting forth the cause of action, and the amount due thereon, and alleging that the action of law was still pending. The bill also alleged that the defendant was the owner of, and had in his possession, certain personal property, and gave the facts, which it was claimed, justified the petitioner in the belief of the existence of the fourth cause named in the act of 1848 (Statute vol. xlvi, p. 96), setting forth that cause and alleging its existence. The bill prayed, among other things, for an injunction to restrain the defendant in the suit at law, from any disposition of the property named, in his possession, inconsistent with the security of the petitioner, etc.

An injunction had been allowed until the further order of the court, and the defendant moved to dissolve that injunction without answer, on

the ground that the statute did not authorize the court to enjoin the defendant in the suit at law from the disposition of his property in his possession. The motion was argued for the defendant by *Storer & Gwynne*, who stated that the commercial court had so held; and by *Coffin & Mitchell*, for the complainant. 468

JOHNSTON, J. This is an application to dissolve an injunction, allowed under the act of 1848, "to amend an act directing the mode of proceeding in chancery," passed March 14, 1831.

No answer has been put in by the defendants, and the only question raised by the motion is, whether, under this act of 1848, property may be enjoined in the hands of the owner, pending a suit at law or equity against him, or whether it applies only to property in the hands of third persons.

The act of 1831 provides this remedy, 1st, against nonresident defendants; 2d, against resident defendants, who shall have done any one of three things: 1st, secretly departed out of the jurisdiction of the court; 2d, secreted himself; or 3d, secreted his property *within* the jurisdiction, so that the process of law cannot reach either. In such case, if any person is indebted to such nonresident or secreting defendant—or has in his possession goods, chattels, rights, credits, moneys, or effects, of such defendant, the plaintiff may file his petition and obtain his injunction.

The injunction provided for in this act extends only to third persons, and affects the property of the defendant in the original suit, in their hands only.

The act of 1848 assigns five additional causes for this process, all new and unknown to the act of 1831: 1st, That the defendant is about to abscond from his usual place of abode; 2d, that such defendant is removing, or about to remove, with his property or effects out of this state; 3d, that such defendant is about to convey, assign, remove, conceal, or dispose of his property with intent to or so as to defraud, hinder or delay his creditors; 4th, that such defendant fraudulently contracted the debt, or incurred the obligation upon which suit is brought; 5th, that the debt or obligation upon which suit is brought was contracted by the defendant without the state, and that such defendant, with intent to defraud, hinder or delay his creditors, absconded from his former place of abode, or secretly removed his property from such state, with intent, etc.

But it is said these are only so many badges of fraud, which may authorize the court to act under the fifteenth section of the act of 1831, and that by the amendatory act no new remedy is provided, nor is the old remedy extended so as to reach property in the hands of the owner.

This position, with great deference to a very ingenious argument, I think is not tenable. The second, third and fifth causes assigned, are peculiarly applicable to property in the hands of the owner, and peculiarly *inapplicable* to property in the hands of any body else. 469

That the defendant is removing, or about to remove, *with his property or effects*, out of this state, seems to be no good reason why an injunction should be laid upon a third person, to restrain him from an improper disposition of property not alleged to be in his hands.

That the defendant is about to convey, assign, remove, conceal or dispose of *his* property with intent, or so as to defraud, hinder, or delay his creditors, seems to be no good reason why an injunction should be

allowed against another person to restrain him from so disposing of property not charged to be in his hands.

That the debt or obligation upon which suit is brought, was contracted by the defendant without the state, and that the defendant, with intent to defraud, hinder, or delay his creditors, absconded from his former place of abode, or secretly removed his property from such state with that intent, seems to be no good reason why somebody else should be enjoined from improperly disposing of property, which, for aught that appears in the showing, he never had in his power.

All three of these assignable causes presuppose the property, which is the subject of the injunction, to be in the hands of the owner, and of course beyond the reach of an injunction upon a third person. The first and fourth of these causes are equally applicable to a case where the delinquent debtor has his property in his own hands, or placed for secrecy in the hands of another.

But let us read the residue of the first section: "The pendency of such a suit" (the original suit for the recovery of money or damages, in aid of which this proceeding is had), "together with the existence of either of the causes above enumerated, shall entitle the plaintiff in such suit to file his bill against *the* defendant, his debtors, those having in their custody any of his property, money or effects, in the same way as is provided in the fifteenth section of the act to which this is an amendment."

The definite article *the* clearly refers to the defendant, against whom the claim exists; because, as yet, there is no other defendant brought into the act to whom it can refer. He is made the principal party defendant 470 to the bill. All others come in after the copulative *and*. They come in collaterally, as mere garnishees, or as persons implicated with the defendant in his purpose to wrong his creditors.

This view is strengthened by reading the third section:

"That the supreme court, or court of common pleas, or any judge of either of said courts, on being satisfied by the oath of the petitioner, his agent or attorney, or by that and such other affidavits, as such court or judge may deem it reasonable to require, of the existence of either of the five causes above enumerated, may grant an injunction to restrain the defendant in such suit from any disposition of any property, credits or effects belonging to the defendant in the original proceedings, inconsistent with the security of the petitioner, until the claim upon which the original suit was brought shall have been adjusted and satisfied, or until further order of the court."

The definite article here again refers to the principal defendant, and, where it is necessary to make other defendants, to those also; and, although it is written in the singular, has a plural signification. It is to be understood as if written, "the defendant, or defendants in such suit." But the words, "defendant to the original suit," are used to show that the injunction affects his property alone.

There is still another reason for this view, growing out of the utter futility of restraining third persons from carrying off, or selling the defendant's property in fraud of his creditors, while he is left free to do the act himself.

The motion now pending is refused.

DOWER—MISTAKE.

503

[Supreme Court of Ohio, Muskingum County, November Term, 1847.]

IN CHANCERY.

Before C. J. Birchard and Judge Hitchcock.

ANNE WARD V. HUDSON WARD AND OTHERS.

BILL. The petition sets forth that complainant is the widow of Dr. J. B. Ward, deceased, and his sole devisee. A copy of the will is annexed to the bill. He died in 1843. She never made her election to take under his will known to the court of common pleas, and prays to be permitted now to do it. She and her husband were English people, ignorant of our laws. She had no suspicion that her title was imperfect until within a month. The defendants are her infant children—those who are of age being willing that she should take under the will.

ANSWER. Defendants being infants, answer by guardian *ad litem*.

EVIDENCE. William D. Ward's deposition proves the facts set forth in the bill.

Goddard & Eastman, for Complainant.

We cannot learn that the question presented in this case has yet been decided in our courts.

We have the relief prayed for upon two grounds. *First*, the ignorance of complainant that any such step was required to perfect her election; and *secondly*, the general doctrine that time is not, in the view of a court of equity, of absolute importance, provided the rights of all persons remain the same.

1. We do not intend to enter at large upon the much vexed question whether relief can be given against a mistake of law. No one can read the fifth chapter of Mr. Justice STORY's Treatise upon Equity Jurisprudence, without discovering that such relief has been repeatedly granted, whatever may be the attempts made to disguise it. The matter is settled upon great consideration by our own court; we refer to *Evarts v. Strodé's Heirs*, 11 O. R., 480.

The case now before the court can, however, hardly be said to require the application of this principle. Mrs. Ward omitted to do an act within the time, which it is said the law requires. Nothing has intervened to change the rights of parties. If the act is done now, everything will be in the same situation in which it would be had the act been done four years ago, and she asks permission to do it now. This leads to the second head of our inquiry.

2. The forty-fifth section of the act relating to wills, requires a widow to elect within six months, whether she will take by the will or be endowed. The forty-sixth section requires this election to be made known to the county common pleas, and entered upon the minutes.

When a man leaves all his property to his widow, why should she be required to *elect* at all? What is she to elect or choose between? By the terms of the forty-fifth section, if it plainly appears that the husband intended that she should hold by the will, and also be endowed, she may have both; that is, she need not elect at all. Is this case stronger than that where the husband leaves everything to his wife?

The forty-fifth section says that the election shall be made in six months—the forty-sixth, that it shall be entered on the minutes of the court; but it does not say *when* this entry shall be made. By the forty-sixth section, the consequence of *failing to make an election* gives the widow her dower and distribution share. No consequence is in terms attached to a failure to *record the election*. If this be thought too nice a criticism of the statute, it must at all events be admitted that the provision was designed for the benefit of the widow, and not for her injury, and that such construction be given the statute as will effect that object, the rights of no other persons being impaired.

Suppose that the statute in terms required the election to be recorded in six months—will an omission to observe this ceremony within this time operate a forfeiture of the estate?

The statute expressly says, that mortgages shall take effect from the time they are presented for record; but the courts say, that for some purposes, and as against the mortgagor, they shall take effect from delivery.

The statute of frauds provides, that all grants made with intent to defraud creditors, shall be deemed utterly void and of no effect; but the courts say the deed is not utterly void—it is good as against the grantor.

506 The statute of frauds provides that no action shall be brought upon a contract concerning lands, unless in writing. The courts say that under certain circumstances (part performance, etc.), the action may be brought, though this form enjoined by law has not been complied with.

The statutes of many of the states require deeds to be recorded within a certain period, without containing the clause to be found in our statute as to subsequent purchases without notice; yet the judicial construction uniformly is, that a record after the statute period is good, except as to subsequent purchasers without notice.

There are two cases in the Ohio reports, and one unreported case, decided upon the circuit, which should be brought to the attention of the court in the consideration of this case.

The unreported case was a bill filed by the widow of the late Benjamin S. Brown, Esq., of Knox county, against the executors, heirs and creditors of her husband, and was decided in the supreme court September term, 184—. The bill set forth that by the will of her husband, certain property was devised to her which she supposed would be a more ample provision than that given by statute, and she elected to take under the will, and caused her election to be recorded in the court of common pleas of Knox county, within six months from the probate of the will. After the six months had elapsed, she discovered that her husband's estate was much involved, and she desired to change her election, for which object the bill was filed. The case was carefully considered by the supreme court, and the relief granted.

Shotwell and Wife v. Sedam's Heirs, 3 O. R., 5, arose under the act of 1831, which required an election only when the devise was expressed to be in lieu of dower; but that difference is not material. The court thought it a nice question whether Mrs. Shotwell (Sedam's widow) was barred of her dower by the will, and they did not decide it. She did not elect within the six months, and never made her election a matter of record, but she did certain acts *in pais* which the court held to bar her dower, and throw her upon the will alone as effectually as if she had made an election within the statute period, and had it recorded upon the

minutes of the court. She and her new husband were seeking dower, and the court held her barred. Suppose we reverse the case, and that they were seeking to establish her rights under the will, and Cornelius Sedam was opposing it—will the court say that a different rule would prevail? Certainly not.

Stilly and Wife v. Folger and others, 14 O. R., 610, remains 508 to be considered. The marginal note is—"The election of a widow to take under the will of her husband, to bar her of dower, must be made in the court of common pleas, within six months after probate of the will."

The great question in the case was, whether a certain ante-nuptial agreement would bar Richard Folger's widow from claiming dower in his estate. The case states, page 610—"This claim of dower was admitted to be valid unless barred by the agreement" (the ante-nuptial agreement). Folger's will is also set up, in which he devises to her that which by the agreement he had stipulated should be hers upon survivorship. Not a word is said in the statement as to whether she elected to take under the will or not. The first we hear of that is in the argument of the counsel for complainants, who say, page 611: "The widow elected to take at law, and not under the will; the contrary is not seriously asserted on the part of the defendants. The filing of the petition in this case within twenty days after the death of her husband, is conclusive of this fact." Nothing further occurs in the case about the election until we come to the argument of the counsel for the defendants, page 624; and they submit that matter to the court without argument. We gather from what they say, that depositions were taken proving certain matters in connection with her election; but what they were does not appear until we come to the opinion of the court, page 646. Judge Wood adverts to this evidence, from which it appears that immediately after her husband's death, she received most of the property devised to her, but declared her intention to claim dower. The learned judge proceeds to say, that no evidence is competent to prove an election to take under the will, but the evidence of an entry upon the minutes of the common pleas; but nothing is said as to the period within which that record must be made—nothing on the question whether a court of equity may permit it to be done after the lapse of the six months. In a word, every thing now presented to the court in the case before them, is intact by that decision.

And now is there any thing in the statute which limits the period of making this election known to the court, or which limits the period within which the entry shall be made upon the minutes? By section 45, the widow has six months within which to make her election. By section 46, the election is required to be made known to the court, and entered upon the minutes: Then follow these words: "And if the 507 widow fail to make such election, she shall retain her dower," etc. How easy would it have been for the legislature to have said—"and if the widow fail to make such election, and to cause the same to be entered on the minutes of the court within six months after probate of the will, she shall retain her dower," etc. But this is not said.

Again: Six months are allowed by section 45 for the election. She has the full period to inform herself as to the situation of her husband's property, that she may act with a full understanding of her rights; and in many cases the time would be too short for this purpose—in most, doubtless, it would be ample. Now if she has the full period of six months within which to make the election, it cannot be abridged by tak-

ing any part of it to apply to the purpose of making her election known and having it recorded. Besides, there may be no term of the court held within the six months. The special term allowed by section 245, page 384, does not embrace it. In Coshocton county, there has been for years one vacation of more than six months. Now suppose a will to be proved in September, on the last day of the September term. Court does not sit again until April. Is the wife deprived of her rights under her husband's will? No one would venture to answer that question in the affirmative.

The true construction would then seem to be, that this election of the widow should be made matter of record at some convenient period after the expiration of six months; and if made before any one is prejudiced by its omission, it will suffice.

In searching as to titles, there will be no difficulty. The clerk will post the entry of the election in his administration docket, and then it would be searched for. One would no more turn over the leaves of the journal for the period of six months next following the probate of a will, to find a widow's election, than he would the records of deeds. The index is resorted to in both cases.

This doctrine of election has not originated with the Ohio statute. It exists in England, and in several states of the union, and has grown up with the enlarged and enlarging jurisdiction of courts of chancery, and is so moulded by them as to subserve in all cases the purposes of justice and equity. In *Brice v. Brice*, 2 Molloy, 21, Sir Anthony Hart, Lord Chancellor of Ireland, refers to a case decided by Sir William Grant, in which he held, that to make an election binding by lapse of time or long acquiescence, "*injury would now arise to third persons* from rescinding it, and that it would be impossible to place them, except in a much worse condition than they would have been, if the party had elected early," and secondly, "*that he knew he had a right to elect*; that is, not only knew the existence of the instrument, but the consequences of it on his rights."

Upon the whole, therefore, although in obedience to the statute we may be required to say that the election shall be made within six months, yet, as the statute is not imperative as to the period at which the election shall be recorded, may we not say that it shall be good if recorded at any time when the other parties will be in no worse condition than if the election had been made earlier, and especially, when the party asking to have her election recorded comes into a court of equity, and shows that a failure earlier to record the election arises from her ignorance of her rights.

BY THE COURT.

The court entered a decree for complainant.

MISTAKE.

[Supreme Court of Ohio, Gallia County, March Term, 1846, and April Term, 1848.]

JOHN NORMAN V. JOSEPH K. WILL.

Money paid under a mistake of facts, can be recovered back. Such mistake consists in the *present belief* of the party paying the money, that it has not been previously paid.

Nor will a previous knowledge of the prior payment, or of facts which might put a party on inquiry, alter the case, if, through forgetfulness, or from other cause, he pays the money at the time, supposing that it had not previously been paid.

The declarations of the party made to one holding his note, between the times of the two payments, recognizing the note as a subsisting note, are admissible in favor of such party, to show that he believes the note not paid.

This was a writ of error to the common pleas of this county. The case below was assumpsit for money had and received. The bill of exceptions showed the following state of facts. John Norman was indebted to one John Newton, and in order to raise the money, borrowed of the Bank of Gallipolis, on the 22d of October, 1839, \$150, for which he gave his note at ninety days with John Newton and James Beard as security. When the note became due, or some time after, it was paid by Newton, and the note delivered to him. In the fall of 1840, Newton, as he was to be absent during the winter, handed this note to this cashier of the bank as a memorandum of the amount Norman was to pay in on a note held by the bank against Newton. In January the bank failed, and the new cashier, finding this note in the bank, with its other dis- 509 counted notes, and supposing from a conversation with Norman that it had not been paid, transferred the note to the defendant, Will, in redemption of the liabilities of the bank. Will took the note to Norman, and he paid it by an order on the Bloom Furnace, which order was paid to Will. The object of this suit was to recover back the money so paid. It was proved by a witness that Norman had been told of the fact of Newton's having paid the note.

On this evidence the plaintiff asked the court to instruct the jury, that if they should find that the plaintiff, at the time he paid said note to said defendant, honestly and *bona fide* believed that said note had not been previously paid by said Newton, then the plaintiff would have been entitled to recover of the defendant the amount so paid him—which instruction the court refused to give; but the court charged the jury, that if the plaintiff had been, previously to said payment, informed of the note having been paid by Newton, then he could not recover it back again. The court also instructed the jury, that if Norman had knowledge of such facts as would put him upon inquiry as to the previous payment of said note, he could not recover—to all which rulings the plaintiff excepted. The verdict was for the defendant, and judgment thereupon—to reverse which, this writ of error was prosecuted.

Nash, for the plaintiff, insisted that the true test was to be found in the *present knowledge* of the party paying money. Was he laboring under a mistake at the time the payment was made? Mere forgetfulness cannot change his rights. 1 Stephen N. P., 347; *Kelley v. Solari*, 9 M. & W., 54; Brom's Legal Maxims, *Lucas v. Warswick*, *Moody & Robertson*, 293; *Norton v. Martin*, 15 Maine Rep., 45; 1 Wend. Rep., 185; *Bilbie v. Lumely*, 2 East Rep., 419. Nor can a knowledge of facts, which might

have put him on inquiry, alter the case. 1 Wend. Rep., 185; 20 Wend. Rep., 174; 6 Mass. Rep., 81; 12 do., 84; *Horn v. Nicholls*, 1 Salk. Rep., 289; 3 M. & S., 344; 9 Mass. Rep., 408.

Welch, for defendant, cited, to sustain the instructions, the case of *Bilbie v. Lumely*, 2 East. Rep., 469, and especially the language of Mr. Justice BAILEY; also 2 East. Rep., 471.

BIRCHARD, J. According to the instructions of the court below, a man's rights would depend upon the strength of his memory. We do not think so. The true test is found in the instructions asked by the plaintiff below. Did the party paying the money, at the time he so paid it, labor under a mistake as to the facts? Did he then suppose the note had not been previously paid? If he supposed it had not been paid, then he paid the money here sought to be recovered back under a mistake. Let the judgment be reversed.

This case was retried at the October term (1846) of the common pleas, and a verdict rendered for the plaintiff. A bill of exceptions was tendered by the defendant, and a writ of error presented by Will to reverse the judgment, which was heard at the April term (1848) of supreme court, before READ and AVERY, Justices.

The bill of exceptions, after reciting the evidence as given above, stated that the defendant had given evidence tending to show that said money was not paid under any mistake, and that plaintiff had been informed of the previous payment of the note by Newton. Thereupon the plaintiff called the cashier of the bank, and offered to prove by him that after the payment of the note by Newton, and before the assignment to Will, the plaintiff called at the bank, and stated that he was informed that the bank was assigning its bills receivable in payment of its liabilities, and requested the cashier not to assign his note; alleging as a reason that he had given the former cashier a draft on Coopers, of Dayton, for collection, and that out of the proceeds of this draft, this note was to be paid. This draft was afterwards returned protested for nonpayment, and was handed with the note to Will. To the introduction of this evidence the defendant objected, but it was admitted; and this was assigned for error.

Welch, for Will, insisted that the *declarations* of a party were not evidence for himself.

Nash, for Norman, referred to 2 Cowen, Phillips' Ev., 592; *Rex v. Smith*, 5 Carr & Payne, 201; *Schenck v. Hutchinson*, 2 N. Car. Law Rep., 432; *Tompkins v. Saltmarsh*, 14 Serg. and Rawle, 275.

The court held the evidence admissible on these authorities, and affirmed the judgment.

SCIRE FACIAS.

[Supreme Court of Ohio, Washington County, April Term, 1848.]

Before Read and Avery, JJ.

HEARN ET AL. V. THE STATE OF OHIO.

It is error to take judgment as by default at the return term of a writ of *scire facias*. The defendant in such case is entitled to a rule to plead before judgment.

The case below was a writ of *scire facias*, issued against the plaintiffs in error, upon a recognizance given by Hearn as principal, and the others as defendants, conditioned for the appearance of said Hearn, to answer unto the state on an indictment for perjury. The record showed that Hearn failed to appear; that the recognizance was duly forfeited; that a *scire facias* was issued at the same term, returned served, and judgment thereupon rendered.

READ, J. We hold that this judgment must be reversed. The record shows that judgment was taken on default at the return term of the *scire facias*. No rule was taken upon the defendant to plead, and the case was never permitted to go to rules, like other cases. We think the case should have gone to the regular rules, that the party might have had time to plead, unless the rules of court had made provision for a short rule to plead in these cases during the term. One or the other course must be pursued—if not, the judgment is erroneous.

WATERCRAFT.

179

[Supreme Court of Ohio, on the Circuit, Miami County, June Term, 1848.]

Before Judges Birchard and Hitchcock.

MCGUIRE V. THE CANAL BOAT KENTUCKY.

[Reported by C. L. VALLANDIGHAM.]

Under the Watercraft law, where a note, expressing itself to have been given generally "for money borrowed for the use of the boat," is sued on, there must be other proof accompanying it, that it was given for money borrowed and expended for some one or more of the particular items, such as "for materials, supplies, or labor," etc., expressed in the statute.

This was an action under the "Watercraft law," brought originally before a justice of the peace, and carried thence to the Miami county common pleas, where it was tried, to the court at the March term, 1848. The plaintiff gave in evidence the following note:

"CHILLICOTHE, December 12, 1841.

"Borrowed of John McGuire, one hundred dollars for the use of the boat M. B. Ross, payable on demand.

"WM. McALLISTER."

The plaintiff proved the execution of the note, that the name of the boat had been changed to the "Kentucky," and that the obligator was master of the boat at the time of affixing his signature, and here rested.

On the part of the defense, the following facts, being admitted by the plaintiff, were relied upon: That the boat had been sold three several times, to different purchasers, since the execution of the note; that the owner, in whose hands it had been attached in the present suit, had purchased her *bona fide*, for a valuable consideration, without notice of the claim sued on, and before attachment in this suit. The case was argued to the court, and judgment given for the plaintiff. The defendant took a bill of exceptions to the supreme court, setting out the foregoing facts.

Smith & Vallandigham, for the defendant, made the following points:

180

1. That there being no evidence to show that the note sued on, was given for money borrowed and expended either for "materials, supplies,

or labor, in the building, repairing, furnishing or equipping" said boat, or "due for wharfage," or for any other item within the statute under which the suit is prosecuted, the judgment should have been given in favor of the boat.

2. That the owner of said boat, in whose hands it was attached, being a *bona fide* purchaser for a valuable consideration, without notice of the claim, and before attachment, the judgment should have been in favor of the boat.

In support of the first position, they contended, that inasmuch as the proceeding depended wholly upon statute law, the statute must be strictly followed—and the case proved to be within its terms and meaning—and that therefore the plaintiff must show: 1. That the debt sued on, was contracted for money borrowed and expended either for "materials" or "supplies," or "labor." 2. That the materials, or supplies, or labor, were for either the "building," or the "repairing," or the "furnishing," or the "equipping" of the boat; or, 3. That the debt was due for "wharfage;" or, 4. That it was due for some other item within the terms of the statute. They argued that either the note itself must disclose on its face one or more of the foregoing facts, or that, otherwise, proof of the facts *dehors* the note, must be produced; and that the court could not intend any one of these facts *prima facie*, from the note in suit. They cited Swan's Statute, 209, and insisted that in equity and on policy, the burden of proof ought to devolve on the holder of the note, to bring it within the terms of the statute. They urged further, the hardship which must be put upon the owner of the boat, should he be required *prima facie*, to show that the items which entered into the consideration of the note, were not those enumerated in the statute; and insisted that the construction claimed by the plaintiff, would put boat owners completely within the power of every dishonest hand in the employ of the boat.

Upon the second point, they cited and examined at length, 10 Ohio Rep., 384; 11 *ib.*, 458; 12 *ib.*, 341; 14 *ib.*, 28, 72, 408; 16 *ib.*, 276. They relied strongly on the reasoning of the court in the case of the steamboat Commerce, 14 Ohio Rep., 408, where it was held, that a purchaser at a judicial sale, takes the boat discharged of liabilities existing at the time of sale; and also on the case of the steamboat Waverly, 14 *ib.*, 28, where the court decide that a purchaser at private sale, *with notice* of a liability, takes the boat subject to such liability; and where much stress seems to be laid upon the fact of notice. They insisted, citing the first mentioned case, that the statute creates no lien, and that upon the general principles of law, and upon sound policy, a *bona fide* purchaser, even at private sale, without notice, and for a valuable consideration, should hold the boat discharged of liabilities. They urged, also, that upon both points the decision ought to be in favor of the defendant, because a contrary decision must tend greatly to embarrass and diminish our inland commerce and navigation, and especially the transfer of boats and other watercrafts, and that no hardship would, by the construction which they contended for, be put upon those who dealt with the boat, nor would injustice be done to them, since they had the right to hold her to ready payment, at their option.

J. H. Hart, for the plaintiff, reviewed the arguments and authorities of the defendant's counsel, and cited the case of the steamboat Arkansas Mail, 4 West. Law Jour., 527.

The Court (HITCHCOCK, J., delivering its opinion), after advisement, ruled the first point in favor of the defendant, holding that under the "Watercraft law," where a note, expressing itself to have been given generally "for money borrowed for the use of the boat," is sued on, there must be other proof accompanying it, that it was given for money borrowed and expended for some one or more of the particular items, such as "for materials, supplies, or labor," etc., expressed in the statute.

The second point, the court felt inclined to rule against the defendant; but an absolute decision upon it not being necessary to the disposal of the case, was withheld.

Judgment reversed, and case remanded for further proceedings.

TAXES.

316

[Superior Court of Cincinnati.]

LESSEE OF GEO. W. GARRETSON ET AL. V. S. M. HART.

[Reported by D. RAYMOND.]

This was an action of ejectment, and the plaintiff declared on two demises, one from Garretson and the other from the state of Ohio. The plaintiff, to support the issue on his part, offered in evidence a deed from the auditor of Hamilton county to Garretson, and rested.

The defendant then offered in evidence an abstract from the duplicate of Hamilton county, from which it appeared that the lots in question were described upon said duplicate, and also in the advertisement of delinquent lots for sale by the treasurer, as follows:

"Hoops, Jacob, Est. out-lot No. 50—25 feet—val. \$230."

"Hoops, Catherine—out-lot No. 50—25 feet—val. \$420."

And in the advertisement under the act of 1842, by the county auditor, the lots are described as follows:

"Hoops, Jacob, Est. No. 20—25 feet—McCoy's division."

"Hoops, Catherine—No. 19—25 feet—McCoy's division."

It was also in evidence, that at the time the list of forfeited lots was transmitted from the auditor of state's office to the county auditor, the following letter was sent with the list:

"AUDITOR OF STATE'S OFFICE, COLUMBUS, O., Jan. 5, 1843.

"*Auditor of Hamilton County:* You will carefully examine the foregoing list, and strike from it such lands and lots as you may know to be erroneously charged, taking care that none escape the duplicate of taxation. You will then proceed to advertise and sell the remainder, according to the original act for the sale of forfeited lands, and the amendatory act, February 15, 1842. Send me a paper containing your advertisement.

Very respectfully,

"JOHN BROUGH,

"*Auditor of State.*

"BY J. B. THOMAS."

Upon this evidence the defendant rested his case. The counsel for the plaintiff then prayed the court to give the jury the following instructions:

1. By the laws of Ohio, lands must be described upon the duplicate for taxation by section, plat, and number, and not by metes and bounds. Swan, 121, 117. Granted.

316 2. All lands in Ohio are either entire original tracts, or parts of entire original tracts. Granted.

3. "There are two classes of entire original tracts of land in Ohio : *First*, entire original tracts under the laws of the United States, such as sections and their subdivisions. *Secondly*, entire original tracts under the laws of Ohio—such as in-lots, out-lots, squares, blocks, and their subdivisions, which have been platted, numbered and recorded." This prayer was granted with the qualification, that surveys of town lots, under the laws of the state, were not entire original tracts, but entire original lots, and might be so described and conveyed.

4. An entire original tract is sufficiently described upon the duplicate by the plat and number, without the name of the owner and the quantity of land ; and the auditor can make a deed without a survey; Swan 115, § 42. Granted.

5. A part of an original tract cannot be pertinently described upon the duplicate without the name of the owner, and a reference to his deeds, because the auditor cannot make a deed without a survey, and a survey cannot be made without reference to the owner's deed, and the owner's deed cannot be referred to, unless the owner's name is known. Swan, 928. Not granted.

6. The owner is required to furnish the assessor with a list and a description of his property, for two objects: *First*, to enable the assessor to find it and to assess its value. *Secondly*, for the purpose, if it shall be forfeited to the state for non-payment of taxes, of enabling the surveyor to survey it, if it be not an entire original tract. If the description be sufficient for these two objects, it is a pertinent description within the meaning of the statute. Swan 909, 15 O. R., 149. Not granted.

7. The law presumes that every public officer has done what the law requires him to do ; and they who allege the contrary, must prove it. Hence, the official return of every public officer is presumed to be true till the contrary is made to appear ; and, therefore, the auditor's deed is *prima facie* evidence of title at common law as well as by statute, without preliminary proof. Swan, 115-928. Granted.

8. The forfeiture of the lot in question, under the acts of 1831 and 1842, vested in the state of Ohio, all the right, title, claim, and interest of the former owner. 3 Chase, 1813. Granted, with the qualification, that the proceedings preceding the forfeiture had been legal. Qualification accepted by the plaintiff's counsel.

317 9. The county auditor derived his authority to sell the lots in question from the act of 1842, and not from the auditor of state. Not granted.

10. The letter of John Brough, offered in evidence by defendant, is irrelevant and illegal. Not granted.

11. A defendant in ejectment cannot avail himself of an outstanding title in his defense, which the owner of that title could not avail himself of, if he were a defendant on the record. Granted.

12. The purchaser of real property from the state for a valuable consideration, has a right to make use of the name of the state according to the forms of law, for the purpose of recovering possession of that property. 10 O. R., 312. Not granted.

13. The action of ejectment lies only to recover a term of years, and not a freehold estate. A lessee for a term of years may therefore maintain ejectment in his own name, but a tenant of the freehold or fee must sue in the name of a fictitious lessee.

This prayer, the court said, might be law, but they did not see its applicability to the case at bar, and therefore refused to give it.

14. A plaintiff in ejectment having made out a *prima facie* title, the defendant cannot rebut that title by showing an outstanding title, unless that title is adverse to the plaintiff's title. Granted.

15. The peaceable possession of real property is a good title against all the world, but the rightful owner. Hence, the rule that the plaintiff in ejectment must recover upon the strength of his own title, and not the weakness of the defendant's, merely means that the plaintiff shall gain no advantage by the defendant's compliance with the consent rule. Not granted.

16. The action of ejectment determines the right of possession, and not the right of property. Hence, if a person in the peaceable possession of land, is ejected *vi et amis* by the rightful owner, he may maintain ejectment against the owner. Granted.

17. A parol license by the right owner to enter upon a person who has no other title than a naked possession, will entitle the plaintiff to recover in ejectment; and the defendant cannot protect himself by showing an outstanding title in the plaintiff's lessor or grantor. Granted.

The court then gave the following general instructions to the jury: "The supreme court of Ohio is a court of last resort. It is composed of able lawyers, well matured in all the principles of law and equity, selected for the places they occupy by the people's representatives, and charged with the duties of their place by the constitution of the state. On its decisions depend all our legal rights; and if these are not sustained, no man's life, or character, or property is safe for an hour. It is not to be expected, that in this state of being, the decisions of this tribunal will be always infallible. But, whether infallible or not, they are binding on us; and it is neither your duty nor mine to overrule them, and to say the least of it, it is in bad taste for an attorney to appeal either to the judge of an inferior court, or a jury of the county, from what this court has decided. The supreme court of Ohio has decided that the proceedings of the auditor of Hamilton county, under the authority of the auditor of state, not under his own hand and seal of office, are void. While this continues to be the law, the plaintiff's title is not worth a fig, and he has no right to recover." 318

To these instructions the plaintiff excepted, and the jury found a verdict for the defendant.

EVIDENCE

[Supreme Court of Ohio, Montgomery County, June Term, 1847.]

Before Justices Hitchcock and Avery.

[Reported by M. E. CURWEN.]

DAVIS v. COFFIELD.

As between the parties to a conveyance, the recital of the payment of the consideration money in a deed, is open to explanation and contradiction, by parol

proof, in an action at law to recover the consideration money, showing that in fact no payment has been made, or that the amount was different from that expressed in the deed.

Assumpsit may be maintained to recover the consideration money due.

IN ERROR.

Coffield, contemplating a removal from the state, and being in need of money, Davis offered to act as agent for him in disposing of his property in his absence, and advance him \$425, which he was to repay himself out of the proceeds of eighty acres of land, that Coffield, to enable him to make a title to whatever purchaser he might find, then conveyed him in fee; and he agreed to account to Coffield for the balance over the \$425 advanced. Davis having sold the land for \$725, refused to pay anything. Assumpsit was brought for the balance due. \$300.

When the plaintiff below offered to prove these facts, the defendant objected to the introduction of the evidence, on the ground that the deed was a contract, and could not, therefore, be contradicted, or varied by parol proof; and he moved for a nonsuit. A verdict was taken for the plaintiff below, with leave to the defendant to move to set it aside, and enter a nonsuit. At a subsequent day, Crane & Davies accordingly moved to enter a nonsuit, but the court gave judgment on the verdict. To reverse this judgment, the present plaintiff brought this writ of error.

Crane & Davies, for Davis.

The contract which the defendant in error is attempting to set up, is within the statute of frauds, and cannot be proved by parol testimony. The direct operation of the evidence offered is to contradict and vary, by parol testimony a written contract. They cited *Maigley v. Hauer*, 7 Johns. R., 341; *Schmerhorn v. Vanderheyden*, 7 Johns. R., 342; 2 Hovenden on Frauds, 103; and many others.

P. Odlin and M. E. Curwen, for Coffield.

The deed is in no sense a contract. A contract is such an agreement, as creates or extinguishes some legal right between the parties, which a court will enforce. But a deed neither creates nor extinguishes any right in favor of one party against the other. It is merely evidence of the fact of transfer of title. And the consideration clause is only a receipt, which may be explained or contradicted, like any other receipt, without producing the paper. 16 Wend. R., 473, 4; 14 Johns. R., 212; 17 Mass. R., 257; 7 Cowen R., 334; *Pomeroy v. Winship*, 12 Mass. R., 514; 20 Johns. R., 340.

Where the consideration clause in a deed recites the payment of the consideration money, parol proof is admissible, at law, to show that in fact no payment has been made. *Wilkinson v. Scott*, 17 Mass. R., 250; *Shepard v. Little*, 14 Johns. R., 210; *Bowen v. Bell*, 20 Johns. R., 341; *Clapp v. Tirrell*, 20 Pick. R., 250; *Whitbeck v. Whitbeck*, 9 Cowen R., 270; 1 Greenl. on Ev., § 27, p. 34, 35; *McCrea v. Purmort*, 16 Wend. R., 469, 470-1. Or, that the amount agreed to be paid was different from that expressed in the deed. *Phillips on Ev.*, 424, 5, 6; *Duval v. Bibb*, 4 Hen. & Munf., 113; *Steel v. Worthington*, 2 O. R., 182; *Swisher v. Swisher*, Wright's Rep., 755; *Belden v. Seymour*, 8 Conn. Rep., 394. Such evidence may be received at law. *Walton v. Cronly*, 14 Wend. R., 63, and cases cited above. Assumpsit will lie for the balance due. 14 Johns. R., 210; 20 Johns. R., 340.

Other points were made, and cases cited, which are not necessary to an understanding of the case.

AVERY, J. The plaintiff in error contends that a deed for the conveyance of lands is a written contract, the truth of whose recitals the grantor is estopped to deny, and that it cannot be pretended or set up, in opposition to the statement in the deed, that the consideration was different in amount from what is therein expressed. The defendant, on the other hand, insists that parol evidence is admissible, on his part, to show that the transaction was not a sale; and that the conveyance was made merely for the purpose of putting the legal title in the plaintiff, who was to act as agent and pay over to defendant the proceeds of any sale he might make. 320

In point of fact, the court do not doubt that the plaintiff below, is entitled to claim the balance of the purchase money of the land, after deducting the \$425, which Davis advanced to Coffield. The only question is, whether he is entitled to recover at law, or will be compelled to go into chancery for relief. We think the law in Ohio is, that the testimony offered is admissible at law, and if it shows that the consideration was greater than that expressed in the deed, the plaintiff below would be entitled to recover.

Judgment affirmed. [Montgomery county Supreme Court Records, F., 634.]

APPROPRIATION OF PROPERTY.

350

[Court of Common Pleas, Hamilton County, Ohio, February Term, 1849.]

IN THE MATTER OF THE CINCINNATI, HAMILTON, AND DAYTON RAILROAD COMPANY.

Damages for property taken—Mode of proceeding—Benefits to be deducted—Difference between general and special benefits.

This was a motion made on the part of the company to confirm certain awards of damages lately made, on account of property taken for the construction of a railroad.

Messrs. T. Walker and C. Anderson, appeared for the company, and *Mr. Gholson*, for those who resisted the confirmation.

The section of the charter upon which the proceedings were founded is in these words:

"SEC. 4. That said company and its officers, engineers and agents, shall have the right to enter upon any land or lots to survey, locate or construct said road, of such width as may be necessary, and to take any materials adjacent thereto, which may be necessary for the construction and repair of said road; and whenever any land or materials shall be taken for the construction or repair of said road, and the same shall not be given or granted to said company, and the owners do not agree with said company as to the compensation to be paid therefor, the person or persons claiming compensation, or the officers or agent of the said company, may apply to any judge of the court of common pleas of the county in which such land or materials may be, who shall issue his warrant to the sheriff of said county, requiring him to summon five disinterested freeholders of said county to meet, on a day named in said war-

rant, not less than ten nor more than twenty days after the issuing thereof, on the land, or near the materials for which damages or compensation is claimed; and said sheriff shall give to the parties interested, ten days' notice of the time and place of the meeting of said freeholders, who shall proceed, after being duly sworn or affirmed, to estimate the damages which the owner will sustain by the construction of said road, or the use of such materials; and in making such estimate, said freeholders shall take into consideration and deduct from such damages, the benefits, both general and special, resulting to the owner of such land or materials, by the construction of said road or by reason of said road passing through or upon said land or lot; and said appraisers shall reduce their award to writing, describing therein the land or lot appropriated for said road, or the materials to be used, as aforesaid, a copy of which, signed by said freeholders, shall be returned to the clerk of the court of common pleas for the county in which such land, lot, or materials shall be situated, by whom it shall be filed in his office, and the

351 said court shall, at the next term, confirm the same, unless fraud or error shall be shown; and said award, when so confirmed, shall be recorded by said clerk, at the expense of said company, and when the amount of damages awarded as aforesaid shall be paid or tendered to the owner of such land, lot or materials, or his legal representatives, the said company shall be entitled to the land, lot or materials, for which damages shall have been awarded, as fully as if the same had been conveyed to the company, by the owner, by deed; and the damages awarded, as aforesaid, if not received from the company when tendered, shall, at any time afterwards, be paid by the company to the owner or his legal representatives, upon demand; and said sheriff and freeholders shall be entitled to demand and receive from said company the same fees which are allowed for the valuation of real property upon execution."

Among the authorities cited, principally against the confirmation of the awards, were the following: 14 O. R., 174; 4 Watts & Serg., 227; 31 Eng. C. L. Rep., 94; 1 Denio, 141, 158; 17 O. R., 350; 16 O. R., 479; 7 Dana, 86; 2 Greene, 162; 1 Neville & Perry, 32; 2 Harrison, 374; 35 Eng. C. L. Rep., 422; 2 Mass., 125; 1 Robinson, 67; 17 Law J. Rep. Exch., 126; 22 Wend., 125; 5 Warton, 461; 6 West. Law Jour., 298.

BROUGH, Prest. Judge, delivered the opinion of the court.

This is a matter growing out of the special provisions of the charter of the Cincinnati, Hamilton, and Dayton Railroad company.

The fourth section of the act amendatory to the charter (vol. 45, O. L., p. 81), substantially provides—

1. That the company may take such lands, etc., as are necessary for the construction of the road;

2. That general and special benefits are to be deducted in fixing the compensation to be made therefor;

3. That awards, made upon that basis, shall be confirmed by this court, unless fraud or error shall be shown; and

4. That, upon such confirmation and payment or tender of the sums awarded to land owners respectively, they shall be divested of title, and the company be entitled absolutely to the land for the use of their road.

Various important and deeply interesting questions are involved; and it is due to counsel upon either side to say that they have been pre-

sented in argument with distinguished ability, research, and ingenuousness. Such arguments are of very great value to a court, and especially in matters of such magnitude as that now before us. 352

The character and objects of this work, as presented in the hearing, commend themselves to a most favorable consideration. We cannot and ought not to be indifferent to the imperative demand made by the rapid progress of the age, by a wonderfully increasing trade, population, and prosperity, for the efficient medium of communication by steam and railway trains. It is our duty to foster and promote such enterprises by all means compatible with the constitutional and legal rights of the citizen. If, in this case, however, the powers granted, or the proceedings under them, are irreconcilable in conflict with the rights of property guaranteed to the citizen, the latter are paramount and must be protected.

It is urged that this charter delegates extraordinary powers in respect to the seizure and appropriation of land and other property, to the uses of the road; and our attention is directed to the constitution of Ohio, fourth section of the bill of rights, viz.: "Private property ought and ever shall be held inviolate; but always subservient to the public welfare, provided a compensation in money be made to the owner."

That private property might be appropriated upon condition of such payment to be made to the owner, for works of a purely public character, which were also public property, as the canals of the state, admitted, from the first, of no controversy whatever. The eminent right of the state to appropriate it rests upon the obligation of the citizen to yield that of his substance which is demanded for the public welfare, suitable compensation being made. Whether a corporation might be invested with this eminent power—one of the highest attributes of sovereignty—was a question about which much and serious doubt might be well entertained. If this were now an open question, it might be forcibly urged that a creature of legislation—a subordinate, corporate agency—could not be invested with this eminent power. But it is not an open question. The character of any work, not the means of attaining its completion, it is held, will determine whether it is a public work, and whether property taken for its construction is taken for public use. *Wilyard v. Hamilton*, 7 O. R. pt. 2, 111.

And, as respects the rule of damages, it is also authoritatively settled, that benefits resulting directly to the owner, from the construction of the work in question, should be considered and deducted in fixing the amount of his money compensation. The first canal law of the state, that of February, 1825, (Revised Statutes 748), directed "a just and equitable appraisal of the loss or damage, if any, over and above the benefit and advantage to the respective owners and proprietors, or parties interested in the premises, so required for the purposes aforesaid." And this principle has been repeatedly affirmed—the case of *Symonds et al. v. Cincinnati*, 14 O. R., 147, being a recent decision upon it. 353

But the amendatory portion of this charter goes further—further than the original charter, than the canal law, or any act of like character with itself, which has come under our observation. It directs specifically that "general and special benefits" shall be considered and deducted; and not alone the general and special benefits which result to the property by reason of the road running through or upon it, but the general and special benefits resulting to the owner, by the construction of the road, as well, and in addition.

Hitherto it has been thought sufficient to say that the benefits accruing to the remaining property of the citizen should be deducted, without any qualifying or enlarging phraseology, and without sending the minds of the appraisers upon a speculative quest for other benefits than those pertaining to the land, which might enure to the owner on account of the construction of the work. The rule is much enlarged in words, by the framers of this act; and still more by the speculative and intangible theory of appraisal which it sets up.

In *Cooper v. Williams*, 4 O. R., 287, there is a definition given to the terms "general" and "special," or accidental benefits, in a case wherein a citizen whose water power had been appropriated, was suing for the special benefit of using upon his own land a portion of the water which the canal commissioners had withdrawn from the head of his mill-race. Judge LANE, delivering the opinion of the court, said: "It becomes important to ascertain the nature of the benefits which ensue from the construction of the canal. They may be classed under the name of general or [and?] accidental. The general advantages are the facilities of traveling, accessibility to market, reduction of the price of transportation, and the effect of these in enhancing the value of the land. The accidental advantages consist of the peculiar benefit conferred upon specific tracts of land by the opportunities of basins, warehouses and other commercial advantages; of all benefits of the water, consistent with its use for the canal, and for the means of navigation, etc., from waste-gates.

350

To attain the general advantages was the precise end for which the canal was constructed. They were designed for all; they belong to all, and may be claimed by all. But the accidental benefits, although often of the highest moment to the individual, are of a nature so indefinite and uncertain, that no vested right exists to exact them from the agents of the state."

We cannot doubt that this is the true interpretation. It is commended as well by its sterling good sense as its high authority. And there is no distinction which will stand between a public canal of the state and the character in which this work is presented to us. It is claimed to be a public work. It is claimed to have the eminent right and privilege of appropriating private property on that account. If a public work, then its general advantages and benefits are common to all, and were designed for, and may be claimed by all. This is the precise consideration for the privilege to take private property; and the company could not take such property without it. Nor, having and enjoying the eminent advantages permitted to a public work, in consideration of the public good, can they be heard to say that the public and general benefits of their work shall be appraised and set-off against the peculiar damages of the citizen? That would destroy all reciprocity and, therefore, all justice, in the relations which are claimed in behalf of the work. It must be a public work for all purposes, not solely for that of appropriating the citizen's land. Nor is there a particle of justice in the idea that, of all community which will rightfully reap the general advantages of a public work, these benefits shall be made matters of offset, and thus of purchase, in relation to the man alone who is compelled to part with his property to secure them. It is, to the extent of the denial in his case of the advantages common to all the community besides, a practical confiscation of his property.

Facilities of traveling, accessibility to market, and reduced transportation are of equal advantage to persons not residing immediately upon

the line of a given work, as to those directly upon, and whose land is taken to construct it. In so far as they enhance the value of land, the benefit is common and general, and due from the work as a public work. But no benefits are thus reflected upon landed property which are not reflected back again upon the company. If the soil and its products rise in value, more acres will consequently be put in cultivation, more produce seek a market, and more profits swell the pockets of the shareholders in the road. In a purely public work, as one of the state canals, this resulting increase would operate to the general advantage again, by diminishing the rate of taxation. But this company is instituted for private gain, and the round of resulting advantages ends in enriching its members. The rate of taxation upon lands is, indeed, increased, proportionably with the increase of valuation. 355

A special benefit resulting, not speculatively or prospectively, but presently and positively, to the possessions of a citizen, may justly be the subject of deduction. If a bog be drained and land is thus redeemed by reason of the construction of the work—if a particular piece of ground be made eligible for warehouses, by abutting upon a depot, or otherwise—or if by any other means the particular property of a citizen is specially benefited, in a manner which is substantial and actual—may be computed and need not be guessed at—such benefit is properly the subject of deduction. But the “general benefits” which would seem to be aimed at by this act, are speculative and conjectural, and may prove altogether illusory. It is not possible, in the nature of things, that they should be judicially ascertained. “As well can it be determined whether the next season will be a fruitful one—the next after it favorable to trade and commerce, and the next after that a year of war or peace.” “Whoever heard of a guessing tribunal being established by law? And what citizen would not tremble for his life, liberty, or property, if placed before such a tribunal?” 2 Harrison's Rep., 40.

The majority of the court are clearly of opinion that if this act is to be construed as directing that general benefits, which are common to the whole community, and may be claimed of right by all, and which are necessarily speculative and prospective; that such, “general benefits,” alike with and in addition to special and certain advantages to the property of the land owner, which are actual and substantial, and the subject of computation—are to be set off against the value of land or materials taken, the charter, *in so far*, is violative of the constitution and of natural right, and cannot be enforced.

We do not overlook the mandatory form in which the legislature have directed that these awards “*shall* be confirmed,” unless fraud or error be shown. The judicial function can be bound by no such mandate, from a department of the government not clothed with judicial power. It is our duty, within the limits of the constitution, to give effect to this act, but no further. It would be the gravest “error,” if not the grossest “fraud,” in us to go further. 356

The phrase “general and special benefits,” must be limited to the remaining possessions of the owner, and to such advantages as are present and positive, and the subject matter of computation with reasonable certainty. They must be exclusive of and other than the common benefits resulting to all and the right of all, by reason of the construction of this public work; and exclusive of and other than speculative and con

jectural future advantages. So construing this act we may give it effect, and for that reason it is our duty so to construe it.

And in this point of view, upon suggestion made that the appraisers had erroneously set off against the damages of these claimants, the common and general, or the speculative and conjectural, advantages which they supposed might result from the construction of the road, we should certainly hear testimony to the point whether they had framed their awards upon such erroneous basis. So, too, upon a suggestion that their awards were so palpably either too high or too low, as to shock all sense of justice, and to establish the presumption that they had acted upon an erroneous legal view of their duties, we should hear evidence to the point of such legal error. As respects the abstract question of valuation, however, upon correct legal grounds, we do not doubt that it is the peculiar purview of the appraisers. Error in law, and not error in fact, we suppose to be the subject matter of inquiry by this court.

These are questions which do not necessarily arise in the view which we take of this case. They are only adverted to because counsel for the company have expressed a wish that, for its future guidance, or possibly to elicit the opinion of a tribunal of higher authority, upon exception taken and *certiorari*, our decision might cover all the controverted points. We think it highly expedient, in order to save future litigation, and for the advantage of all concerned, that a definitive settlement of these questions should be had; and have no hesitation, therefore, in giving all needful advantages to that end. The case, however, in our judgment, may be disposed of upon the special exceptions which are taken to the awards themselves. These are—

387 1st. That the warrants do not follow the charter in describing the land as "taken for the road."

2d. That in neither the warrants nor proceedings, does it appear that the land was necessary, and no more was taken than necessary for the road.

3d. That the warrants do not certainly describe the land taken.

4th. That the awards do not show that the claimants had notice.

5th. That things other than money are awarded by way of compensation.

6th. That the value of the land taken, instead of damages caused, is appraised.

Several minor exceptions have been urged, but they are of no moment, as to the conclusion to which we have come, except, perhaps, the award to Isaac C. Miller, in which there is a variance between the day notified for the meeting of the appraisers, and that on which they did actually meet. This, we suppose, is error, and fatal to the award.

The rule of construction by which these proceedings are to be regarded, was eagerly and ably controverted by counsel. We are clear that it should be that of strict law. The proceedings are under an incorporation and referrible to its charter;—they are the acts and doings of an extraordinary tribunal—above all, they work a *forfeiture* of the citizen's property without his consent. These are ample reasons why this summary, and, to some extent, arbitrary, course of proceedings should be allowed nothing by construction, but be held to a strict compliance with the law of its creation.

Of the above stated objections in their order. And—

1st. That the warrants do not describe the land as "taken" for the road. But they recite that the company with its agents has gone upon

the land and surveyed and located the road thereon ; and this we suppose to be as complete a taking as was contemplated primarily, looking at the whole section together, and quite sufficient as the predicate for an appraisalment.

2d. That it does not appear that the land taken was necessary and no more than was necessary for the construction of the road. This is a defect in the proceedings, but not necessarily fatal. We hold that it should not be left to the company to determine how much land they may take by means of this summary and arbitrary proceeding, against the consent of the owner. It should be submitted to and passed upon by the appraisers, and be reviewed here. But the citizen is not without remedy, since, for any abuse of the power of appropriation conferred by the charter, he would doubtless have his special action on the case. And, therefore, though we regard this as a defect, it is not, we repeat, necessarily fatal to the proceedings. 358

3d. That the warrants do not certainly describe the land taken. They describe it as land surveyed and upon which the company, by its agents, have located the road. We think this sufficient.

4th. That the awards do not show that the claimants had notice. But we suppose it enough if that notice appears any where upon the face of the proceedings. And we have the sheriff's return of legal service of notice upon them respectively.

The 5th and last exceptions we shall consider together. They are that things other than money have been awarded in compensation, and that the value of the land instead of the damages caused, has been assessed to the claimants.

It is evident from the awards that both of these exceptions are well taken. The submission "was to estimate the damages which the owner will sustain by the construction of said road," instead of which they have estimated and awarded the "value of the land taken" alone. Other damages incident to the land taken, and on account of rights enjoyed upon and by means of the ownership of it, there unquestionably are. Such rights are the subject matter of property, moreover, and come clearly within the constitutional guarantee. They are inviolable unless for public use, and upon compensation to be made in money. But the appraisers have undertaken to compromise, instead of compensating for them in money. Thus, where one landowner's carriage road is cut, as an equivalent for the deprivation of his means of ingress and egress, they stipulate that the company shall construct him a carriage way across the line of the road. For the damage of breaking another's enclosure, they stipulate that the company shall construct "sufficient cattle guards at particular points. For the damage of obstructing the drainage of a third, they provide that the company shall construct a culvert here and there. And, whereas the road is located so near the house of another, as to put it in daily danger of being burnt down, and to make it far less pleasant and valuable as a family residence, it is provided that the company shall not lay their track "within a less distance than eight feet of the northwest corner of the house."

We are unanimously of opinion that these stipulations must have been made by the appraisers, not in addition to an adequate money compensation, but as an equivalent of what they would otherwise have felt constrained to award in money. This is clear from the fact that the money compensation is specifically stated to be the naked value of the land taken. All else is to be compensated by these acts of service 359

or forbearance on the part of the company. If these stipulations had been within the power of the appraisers to make, and might, therefore, be enforced against the company, they would still be incompatible with the constitutional rule which recognizes money, and nothing else, as the medium of compensation for property taken. But they are not within the provisions of the charter, or the terms of the submission; and were not given in charge to the appraisers. They have, to that extent, exceeded their power, and their acts, partaking of the excess, are a mere nullity, importing no legal obligation upon the company whatever. Doubtless the latter, upon confirmation of the awards, might recognize the honorary obligation to perform these stipulations; but we are settling questions of law, and not of mere honorary obligation.

We are unitedly of opinion, therefore, that these awards in giving a money compensation for the naked value of the land taken, whereas the submission was to "estimate the damages by the construction of the road;" and in compromising instead of compensating the deprivation of property and rights incident to the land, whereas they should have been paid for in money—are incompatible with the rule of the constitution, and incompetent for the appraisers to make under the powers given them. The motion to confirm them must, accordingly, be overruled.

490

DOWER.

[Montgomery Supreme Court, June Term, 1849. In Error.]

Before Justices Avery and Spalding.

OLINGER v. HOFFMAN.

[Reported by M. F. CURWEN.]

Dower—Taxes—Waste.

When the revisioner of a life estate procures the lands to be entered for taxation in his own name, and voluntarily pays the taxes for a number of years, he cannot afterwards evict the tenant for life for waste, because the lands are sold for taxes, unless he first gave the tenant notice that he would no longer pay the taxes on the premises.

That the lands were so entered, and the taxes paid, are circumstances proper to go to the jury, and from which they may infer that the taxes were paid by the reversioner, in pursuance of a contract between him and the tenant for life.

Fanny Hoffner is tenant for life of a dower estate. Olinger, some time previous to 1835, purchased the reversionary interest in the land, and, in 1835, procured the lands to be entered in his own name on the auditor's books, and regularly paid the taxes thereon for about ten years. In 1847, the lands were sold for taxes; and soon after Olinger brought an action of ejectment against the tenant for life, claiming that she had forfeited her life estate by this commission of waste. The court below charged the jury that they might infer from the fact that the reversioner procured the lands to be entered in his name, and had regularly paid the taxes for ten years, that he did so in pursuance of a contract with the tenant for life. Upon this a verdict was found for the defendant, and judgment upon it; and this is now assigned for error.

SPALDING, J. The reversioner, having for so many years paid the taxes, cannot be permitted to take the tenant for life by surprise, and evict her for their non-payment. Under the circumstances, he was bound to give her notice, if he did not mean in future to pay the taxes.

That the lands were so entered, and the taxes paid, were circumstances proper to go to the jury, and from which they might infer that the taxes were paid by the reversioner, in pursuance of a contract between him and the tenant for life.

ARREST FOR DEBT.

543

[Supreme Court of Ohio, Montgomery County, June Term, 1849.]

SAYRE v. LANGDON.

Special bail—Ca. Sa., when returnable—Time for surrender.

Haynes was arrested upon *capias ad respondendum* at the suit of Langdon, and Sayre and Collins became his bail. Judgment having been obtained against him, a writ of *capias ad satisfaciendum* was sued out by the present defendant on the 22d of September, 1848, the court being then in session, returnable at the next term, to take the body of Haynes in execution. The sheriff returned on the next day, at the same term, that Haynes was not found within his bailiwick.

Suit was then commenced against Sayre, Collins not being within reach of process, on the bail, and judgment obtained.

The plaintiff in error assigned two principal objections to the proceedings, and upon which he asked the judgment below to be reversed: 544

1. That the *ca. sa.* was returned at the same term at which it issued, when it should have been returned at the next term.

2. That the writ did not allow fifteen days, in which by statute, the bail might surrender the body and be discharged from their bond.

MR. JUSTICE AVERY pronounced the opinion of the court.

As to the first objection, he remarked that it had never been the usual practice on a *ca. sa.* to wait till the next term for it to be returned, and, upon this point, the court do not decide that it is error to return the writ at the same term.

The second objection however was sustained. An action cannot be maintained upon the bail bond, without giving the bail the statutory notice. An interval of fifteen days must, at the least, intervene between the issuing and the return of the writ. Swan's Stat., 656, § 35.

Judgment reversed.

CONTEMPT.

[Knox County Common Pleas, July Term, 1849.]

OHIO EX REL. NEWMAN V. CLEMANTS ET AL.

[Reported by C. H. SCRIBNER, Esq.]

Attachment for contempt—Form of writ.

Where a writ of attachment is issued under the statute, authorizing such process, in cases where it is alleged that the defendant has committed waste, after being enjoined from so doing. (Swan's Stat., p. 712, § 45 and 46), such writ must command the sheriff to attach the defendant to answer unto the "State of Ohio," and not unto the court, against which the alleged contempt was committed. It is such a prosecution as falls within the provision of the constitution, declaring "that all prosecutions shall be carried on in the name of, and by virtue of the authority of the state of Ohio." The form given by Wilcox (Wilcox's Ohio Forms and Prac., 2d edit., p. 645), for a writ of attachment in such cases, is, in this particular, incorrect.

This was a case of attachment. The complainant, Newman, filed his bill in chancery against the defendants, alleging that they were committing waste on certain realty of which he was the owner, and praying for an injunction to restrain them therefrom. The prayer was granted, and the writ was issued and served on the 25th of June, 1849. On the 11th of July, the complainant filed affidavits, setting forth that the defendants were disregarding the injunction, and continuing to commit waste on the aforesaid premises, and filed also therewith, specifications
539 of his charges against the defendants in that respect, together with proof of service of the injunction, and moved the court for an attachment against the defendants for such contempt. The court ordered the writ to issue, which was done; and the defendants were brought into court. They now moved to be discharged out of custody, for the reason that the writ commanded the sheriff to attach them to answer unto the court, and not unto the state of Ohio. They maintained that the court had no power to issue such a writ, or institute such a prosecution in its own name. If there was any contempt of court committed, that contempt was an offense against the authority and dignity of the state, and which could be punished only in the name of the state.

It was insisted, in opposition to the motion, that the writ was copied *verbatim et literatim* from the form given by Wilcox, in his Ohio Forms and Practice; that it was the form which had been in use throughout the state for about seventeen years, and therefore ought not to be overruled on slight and trivial grounds. It was urged further, that the writ properly required the defendants to appear and answer unto the court, as the court had the power and authority, in cases of alleged contempt, to compel the attendance of the defendants for the purpose of requiring of them answers to such interrogatories as they might see proper to propound concerning such contempt.

BY THE COURT. The constitution provides, that all prosecutions shall be carried on in the name of, and by virtue of the authority of the state of Ohio. If the case now under consideration be "a prosecution"—such a one as is contemplated by the criminal law—there can hardly be a doubt remaining in the mind of any person, but that this writ was irregularly issued. Is it then a prosecution? If it be not a prosecution, what is it? To be sure, the writ sets out that the defendants are to

answer unto the court, for a contempt thereof. But is not this contempt of court a violation of the laws of the land? Is it not an offense against the authority and dignity of the state? It appears to us that it is, and that it is because it is such an offense, that the court is clothed with power to punish it; but this power must be exercised in the name of the state, whose authority is contemned. The writ in the case, it is true, is copied from the form given by Wilcox, in his excellent work on Practice; and it is with considerable diffidence and hesitation that we question its correctness. Mr. Wilcox has justly earned the reputation of a learned and industrious lawyer, but like all other members of the human family, is liable to err. His work has met with the general 540 approbation of both the bench and the bar; but still our own convictions are, that this form is, in this particular, incorrect. Even Mr. Wilcox himself appears to contemplate that the prosecution should be carried on in the name of the state; for in the very next form, we find it so laid. Being of the opinion that the defendants cannot be compelled to answer unto any other power, we are in the present case forced to order their discharge.

CRIMINAL LAW.

566

[Court of Common Pleas, Hamilton County, Ohio, March, 1849.]

ANONYMOUS.

Larceny—Constructive taking—Disposition of owner.

A. B. was put on trial for the larceny of a mare. Proof was offered by prosecution, that he obtained the animal by hiring her to go to Cheviot, and return the next morning; that his conduct at the time was marked by levity; that he gave a false answer to question of prosecutor's witness, "for what purpose he was going to Cheviot;" that he took the mare at a late hour the same evening to another stable, had her put up, and offered her for sale for so low a price as to excite the suspicion of the landlord, who gave orders that the animal should not be delivered to defendant by the hostler in the morning; that defendant, who slept at the same tavern, rose early and went away, without inquiring for the mare, leaving her in the hands of the landlord, from whom the owner, 567 several days after, obtained her. No evidence was offered to show where the defendant really did go with the animal, nor that he did not in fact go to Cheviot; and the tavern at which he stopped in the evening, was not out of the direction thither, or returning thence.

Upon this state of fact, the court (Judge BROUGH presiding) charged the jury that larceny might be predicated of a transaction in the nature of a hiring, if this were merely a fraudulent pretext to obtain the property, under a design, existing at the time, and not afterwards conceived, to appropriate and convert it. Pear's case, 2 East, P. C., 685; Charlewood's case, 2 *Ib.*, 689; Semple's case, 2 *Ib.*, 691.

But, inasmuch as it seemed from the evidence the defendant had the animal upon an agreement to use her by going to Cheviot, and return her

the following morning, and as his possession in the meantime was, in contemplation of law, the possession of the owner, the jury must consider whether he had done any act to wrest and destroy this constructive possession, and to convert the property to his own use. Had he violated, and put an end to the bailment, as by going otherwise than to Cheviot? Had he converted the animal, by selling or pawning her, or otherwise putting it out of his power to return her, as agreed? *A mere offer to sell was not enough.* It evinced a desire to convert the property, but was not a conversion. Unless, by some violation of the terms of the bailment—some act of conversion to the defendant's use—the jury found that the constructive possession of the owner had been wrested and destroyed they could not find a larceny, however fraudulent the hiring on the part of the defendant. It could not be said that a larceny had been committed of property, if it were not, in legal contemplation, out of the owner's possession. Brook's case, 34 E. C. L., 396; Russ. Cr., 54 (n).

This instruction related to the time comprised in the limits of the bailment. If the property was overkept, and the agreement thus violated, that would be conversion. But the jury, if they found the fact to be so, would inquire why it was so. Was it on account of any wilful act of the defendant? Or, was it kept out of his hands by the landlord, and beyond his power to return? If the hiring was fraudulent, *animo furandi*, and the overkeeping wilful, they might find guilty; but, lacking *either* of these elements, they must acquit. The defendant was acquitted.

37

BOUNDARY BETWEEN OHIO AND MICHIGAN.

[Supreme Court of Ohio, Lucas County, July Term, 1849.]

WILLIAM P. DANIELS v. DOE EX DEM. OLIVER P. STEVENS: IN ERROR.

Before Judges Hitchcock and Caldwell.

[Reported by M. A. TILDEN.]

In the court below, the case was an ejectment to recover possession of a lot of ground in the city of Toledo, situated between the Harris and Fulton lines, and being within the territory involved in the memorable dispute between Ohio and Michigan, in the time of Gov. Lucas. Both parties claimed under one Sutphen, the plaintiff below, under regular conveyances, and the defendant by certain judicial proceedings, the validity of which was the sole question raised and decided. In April, 1836, a term of the court of common pleas was held at Toledo (in the disputed territory), at which a suit was commenced in chancery, by one Stephen B. Comstock, against Sutphen, to compel the specific performance of a contract for the sale of the premises in controversy. At the same term a subpoena was issued, and served by copy left at the dwelling house of Sutphen, which was also situated in the contested district, and regularly returned into court. Sutphen belonged to the Michigan

party, and paid no attention to the case. The act of congress for the adjustment of the boundary controversy, and the admission of Michigan into the Union as a state, was passed in June, 1836. At the October term of the court of common pleas, 1836, Sutphen having neglected to defend the suit, the matters of the bill were taken as confessed against him, and a decree was entered requiring him to convey to Comstock in fee simple, and providing that, in default thereof, the decree itself should operate as such conveyance. No deed was ever executed by Sutphen to Comstock, and Comstock afterwards conveyed all the title he had to the defendant below, who entered upon the possession, and continued to hold, down to the period of the service of the declaration in ejectment. 38
The point decided by the court below was, that the court acted without jurisdiction, and that the proceedings and decree relied on by the defendant below, were *coram non judice*, and absolutely null and void; and the writ of error in the present case was brought to review that opinion.

Tilden and Baker, for the plaintiff in error, submitted the following points and authorities:

1. That the question of the boundary, as there presented, was a political question, which had been acted upon and decided by the legislative department of the government of Ohio, constitutionally clothed with power over the subject matter; and that having been so acted on, it was not competent for an Ohio court, in a case prosecuting the question collaterally between suitor and suitor, to review and reverse the doings of the political department of the government. The following among other authorities were cited: *The Exchange v. McFadden*, 2 C. R. S. U. P., 439; *Poole v. Lessee of Fleeger*, 11 Peters, 185; *Bedel v. Loomis*, 11 New Hamp. Rep., 9.

2. That the question of title to the disputed territory between Ohio and Michigan, did not necessarily arise in the case; that it was not incumbent on those having rights springing from the judicial proceedings in question, to maintain that the right of jurisdiction was in Ohio; that it was enough to show that there was a full jurisdiction in fact; and that as a matter of fact, proved by the public history of the times, the authority of Ohio was complete, absolute and supreme. *Kern et al. v. Mutual Assurance Society*, 2 Pet. Cond. R., 345; *Piatt et al. v. Oliver et al.*, 2 McLean's Rep., 267-284.

3. That the act of congress of June, 1836, was not to be viewed in the light of a legislative grant to Ohio, of territory to which she had no title before; but as being the assent of congress contemplated by the proviso in the boundary clause of the constitution of Ohio; and having the effect of ratifying, if any ratification was required to legalize the acts done in the exercise of jurisdiction on the part of Ohio.

4. That as an open question, properly arising in the case, the leading arguments employed during the controversy on the part of Ohio, were abundantly sufficient to vindicate her claim; and by no means repelled by the reasoning of the circuit court of the United States in *Piatt et al. v. Oliver et al.* (1 McLean's Rep., 295), relied on by defendant in error.

Hill, Bennett and Perigo, for defendant, relied mainly on the case of *Piatt v. Oliver*, *supra*. 39

HITCHCOCK, C. J. Having detailed the facts, and adverted to reasons tending to show that the jurisdiction of Ohio was rightfully executed and exercised on the disputed territory, concluded the opinion of

the court by remarking, in substance, that the question was a vexed one; that the circuit court of the United States for this district had held that the title of Ohio was derived from the act of Congress of June, 1836, passed after the inception of the proceedings under consideration; that that opinion had been followed by the court below; and that therefore the court could not say that the case was so free from doubt that the decision of the court below ought not to be affirmed.

COVENANT FOR QUIET ENJOYMENT.

[Supreme Court of Lucas County, July Term, 1849.]

Held by Judges Hitchcock and Caldwell.

PENDLETON AND BROWN V. JAMES MYERS. IN ERROR.

[Reported by M. H. TILDEN.]

- Pendleton and Brown sued Myers, in the court below, and counted on the covenant for quiet enjoyment in a lease, executed by Myers to them. The lease was for the term of one year, at a rent of one thousand dollars per annum, payable quarterly, no part of which had been paid, and the tenants were evicted by one having the better title, before the expiration of the first quarter. An objection was made in the court below, as to the right of the plaintiffs to maintain the action, and the case was carried to the supreme court, for the purpose of ascertaining the rule of damages. The facts disclosed in the bill of exceptions, bearing upon that point, were the following: The premises were a warehouse and dock, designed for and adapted to a forwarding and storage business, and the plaintiffs were forwarding merchants. They had entered under their lease, in the fall, and the building contained a very large amount of property, belonging to various persons, which the plaintiff had undertaken to keep safely, for a compensation, until the opening of navigation in the spring. They were turned out of possession in January—a season of the year when they could neither ship the property eastward, nor get it stored elsewhere until spring; and they were actually compelled to pay 40 for its storage, over and above what the rent would have been, about one thousand dollars, and this they sought to recover back under the covenant referred to.

Hill and *Bennett*, and *Tilden* and *Baker* for the plaintiffs, insisted that the covenant was an undertaking to indemnify, under which the plaintiffs were entitled to be compensated for the loss actually sustained; they admitted that under such a covenant, in a deed conveying the fee, the rule of damages, upon an eviction, would be the consideration money and interest, which would, in most cases be a just measure of compensation; but they contended that the rule was inapplicable to leases, under which a chattel interest merely was created, having the qualities of personal property; and that it was calculated to operate unjustly, since under a lease the consideration money is the rent, which is an equivalent for the possession and not for the land; they admitted that the rule had been applied to a lease in one case in New York, but cited cases to show that the law was otherwise settled in England. And they contended that in an action on an undertaking to give possession contained in an agree-

ment for a lease, the rule established by the decisions v damages, and that in principle the cases were alike. 9 ages, 30, 28, 170, 2; Greenl. on Ev., see 258, 254; 14 Hill, 99, 2 *ib.*, 105; Harrison's Dig. v. 5, p. 894; 4 Mas R., 17, 8 O. R., 178; 17 Wend. R., 71, 21 *ib.*, 348; 1 E 14 Price, 19; *Nurse v. Barnes*, Sir Thos. Raymond's R

Wait and Young, and *John Fitch*, for defendant.

There is no reason for distinguishing the present an action on the usual covenant of title and possessio deed of conveyance; and there the largest damage gi the law as settled in this state, is the consideration m And the rule has been so applied by the supreme cot *Kinney v. Walle*, 14 Wend., 88.

The court affirmed the judgment of the court bel the plaintiffs were entitled to recover nominal damages

CRIMINAL LAW.

[Muskingum Supreme Court, November Term,
IN ERROR.

G. W. PRINGLE ET AL. V. THE STATE OF

[Reported by B. EASTMAN.]

Indictment—Immaterial witness—Proof.

Indictment found at the August term, 1847, of Mu pleas, under the act entitled "An act to secure the invi of human sepulture."

The indictment contained five counts. Three o the allegation that defendants removed the body of A. where it had been deposited, etc., without the consent of the deceased, "there being then and there a widow and relatives of said A. B."

On the trial below, it appeared in evidence that th widow.

Harper, Goddard and Eastman, for prisoners, ask charge the jury, that it could not find prisoner guilty counts, which charge the court refused to give. The verdict of guilty upon all the counts, and judgment acc

A writ of error was sued out. The principal erro the refusal of the court below to give the jury the instr *N. A. Guille, Esq.*, for the state.

Judges BIRCHARD and HITCHCOCK held, that alti tion that the deceased left a widow was not necessar descriptive of a material allegation, and that the pros to prove as laid.

Judgment reversed.

POORHOUSE.

[Muskingum Supreme Court, October Term, 1848.]

In Error, from Muskingum Common Pleas.

TRUSTEES OF LICKING TOWNSHIP V. TRUSTEES OF MUSKINGUM TOWNSHIP.

[Reported by E. B. EASTMAN.]

Pauper—Poorhouse—Liability.

Action of debt under the 8th and 9th sections of the "Act for the relief of the poor" (Swan's Stat., 634), to recover, for temporary relief furnished to a pauper who had a settlement in Muskingum township, of expenses incurred in removing such pauper to place of settlement. Declaration contained a special count and common counts. Plea *nil debet*.

On the trial below, it appeared from the testimony of plaintiffs that at the time the relief, etc., was furnished, there was a poorhouse in Muskingum county in which said townships are situated.

Goddard and Eastman, for defendants, having introduced no evidence, moved the court for a nonsuit, "upon the ground that for such expenses, etc., the defendants were not liable at all to the plaintiffs, and that said 8th and 9th sections were intended to apply in cases where there was no poorhouse in the county," which motion was sustained.

A bill of exceptions was taken by *C. C. and T. Convers*, for plaintiffs, a writ of error sued out, and general errors assigned.

Plaintiff's counsel claimed that the said 8th and 9th sections were not expressly repealed by the "act to authorize the establishment of poorhouses" (Swan's Stat., 638), nor by implication, as those sections might well stand with the last mentioned act; that repeals by implication are not favored, and cited 4 Howard U. S. Rep., 37; 2 Pick., 176; 4 Gill & Johns., 152.

Defendants' counsel insisted that the 12th section of the "act to authorize the establishment of poorhouses," was designed to provide for the case made by the plaintiffs. 13 Ohio, 104, was cited to show that the court then assumed the law to be as defendants claimed. Judges BIRCHARD and AVERY held the law to be as defendants claimed, and judgment below was affirmed.

CLERK—DUTY AS TO ELECTIONS.

[Court of Common Pleas, Hamilton County, Ohio, November Term, 1849.]

THE STATE OF OHIO, on the Relation of Lewis Broadwell, John L. Scott, and George W. Runyan v. EDWARD C. ROLL, Clerk of the Court of Common Pleas of the County of Hamilton.

[Reported by T. WALKER.]

Proceedings for removal—Duty of clerk under the election law—What is a breach of good behaviour.

On the 5th of November, 1849, *Messrs. B. Storer and T. Walker*, counsel employed by the relators, appeared in court and presented the following complaint, which was read:

To the court of common pleas for the county of Hamilton, and state of Ohio :

Lewis Broadwell, George W. Runyan, and John L. Scott, citizens of said county, and legal voters in the 1st district of the county of Hamilton, composed of the 1, 2, 3, 4, 5, 6, 7, and 8th wards of the city of Cincinnati in said county, as provided by the statute of the state of Ohio, passed February 18, A. D. 1848, entitled "an act to fix and apportion the representation of the general assembly of the state of Ohio," respectfully represent, and now give the court aforesaid herein to understand: That at the general election for state officers, as provided by law, in said state of Ohio, on the 2d Tuesday of October, A. D. 1849, the petitioner Lewis Broadwell was a candidate for the office of senator, and the said George W. Runyan and John L. Scott were candidates for the office of representative to the general assembly of the state of Ohio, to be elected in and for said district, composed of the said wards above described; and then and there at said election received a large majority of the legal votes given, all of which will fully appear on reference to the poll books and returns of the judges of the election for said 1, 2, 3, 4, 5, 6, 7, and 8th wards, now on file in the clerk's office of this court, and the said petitioners were then and there duly elected to represent said first district, composed of said wards, in the general assembly of the state of Ohio, the said Lewis Broadwell as senator, and the said George W. Runyan and John L. Scott as representatives aforesaid, and were then and there entitled to receive, from the clerk of this court, as is required by the 41st section of the statute of Ohio, entitled "an act to regulate elections," passed February 18, 1831, certificates of their election as aforesaid, 122 they having received, as aforesaid, the highest number of votes for said offices given within said district at said election.

And your petitioners further represent that on the 15th day of October, A. D. 1849, the judges of the election for the said 1, 2, 3, 4, 5, 6, 7, and 8th wards, composing said 1st district in said county of Hamilton, had made return to the clerk's office of the court of common pleas, of the poll books of said election in each of said wards, with the exception of the 8th, had returned also to said clerk's office, the number of votes that each candidate had received at said election within said several wards for the office of senator and representatives, and had certified the same, and thereupon, the clerk of this, the said court, Edward C. Roll, then and there duly appointed and qualified to act in that capacity, did proceed to open the said returns, having taken to his aid, two justices of the peace for said county, as required by the 36th section of the act last referred to, and to make abstracts of the votes contained therein; and thereupon it appeared by said returns, that the said Lewis Broadwell had received for senator in the general assembly of the state of Ohio, for the 1st district in the county of Hamilton, 2,795 votes, and the said Lewis Broadwell, having thus received the highest number of votes given in said 1st district, for said office, was then and there duly and legally entitled to receive of and from the said Edward C. Roll, clerk as aforesaid, a certificate of his election thereunto, as is provided in the 54th section of said act, and it further appeared by said returns aforesaid, that the said George W. Runyan at said election, had received in the said several wards above named 2,794 votes, and the said John L. Scott had received 2,799 votes, being the highest number of votes given therein, for representatives at said election. Yet so it is, that the said Edward C. Roll, at the time aforesaid, and still being clerk of this court, having been duly appointed and qualified heretofore to act in that capacity, did

then and there to-wit, on the 17th day of October, A. D. 1849, and at divers days and times afterwards, when the same was demanded of him by the said petitioners, wilfully, unjustly, and illegally refuse to give to said petitioners, or either of them, certificates of their election, to the offices before described, he the said Edward C. Roll well knowing that they and each of them, were and had been duly elected thereunto. to-wit, the said Lewis Broadwell as senator, and the said George W. Runyan and said John L. Scott as representatives from the said 1st district of Hamilton county aforesaid, as fully appeared from the returns of votes for said 1st district, then on file in his office, which said returns, the said E. C. Roll had before that time examined in the presence of Peter Bell and William Jessup, justices of the peace within and for said county.

And the petitioners further say, that the object and purpose of the said E. C. Roll in refusing to give them the said certificate of their election, is to prevent their admission to their seats, the said L. Broadwell as senator, and the said G. W. Runyan and J. L. Scott as representatives aforesaid, and thereby enable other persons who have no legal and just right to claim the same, to take and hold their seats, instead of the petitioners, in the said general assembly aforesaid, all of which is contrary to law, and in derogation of the rights of the petitioners, and of the voters of said district, who had cast their ballots in their favor at the election aforesaid.

Your petitioners further charge that the said E. C. Roll, disregarding his said duty as clerk of this court, under the laws of the state and his oath of office, hath also unlawfully and unjustly given to one William F. Johnston, Andrew J. Pruden, George E. Pugh, Henry Roedter, Alexander Long, and John Bennett, certificates that they were duly elected, to-wit, W. F. Johnston, as senator, Andrew J. Pruden and Geo. E. Pugh, Henry Roedter, Alexander Long, and John Bennett as representatives for the county of Hamilton generally, without any reference to the division of said county, thereby disregarding the law apportioning the rep-

123 resentation herein before referred to, and deciding that the said law, so far as the districting of the county of Hamilton aforesaid is concerned, had no constitutional existence, and your petitioners had not been and were not elected as aforesaid. All of which your petitioners charge was an assumption of power by said E. C. Roll, and an utter disregard of his duties as clerk aforesaid, he the said E. C. Roll, well knowing the said W. F. Johnston, Geo. E. Pugh, H. Roedter, A. Long, and J. Bennett, and A. J. Pruden, had neither of them received a majority of the votes in said 1st district at said election for the said offices of senator and representatives, as the returns aforesaid filed in his office of the judges of the election for said several wards in said 1st district, fully prove.

Wherefore your petitioners pray your honors that the said E. C. Roll may for the causes aforesaid, be removed from his said office of clerk of this court, as by the constitution and laws of the state your honors have the right and power to do, whenever the clerk of this court shall, in his official capacity, disobey, obstruct or put at defiance the laws of the land.

(Signed)

LEWIS BROADWELL,
G. W. RUNYAN,
JNO. L. SCOTT.

This complaint was sworn to by the relators. Counsel then moved that the same should be filed, and a day fixed for the hearing.

Alfred G. W. Carter, Prosecuting Attorney for the state, made an objection, that such a complaint could only be presented through himself in his official character. He cited the act to provide for the election of Prosecuting Attorneys (Stat., 788), the 3d section of the amendatory act passed at the session of 1854 (*The Commonwealth v. Barry* (Hardin's Rep., 310), *Commonwealth v. Arnold* (3 Littell's Rep., 310)).

Upon the objection of his remarks, he was requested by the counsel for the respondent to state whether it was his purpose to take charge of this case against the clerk. He replied, in substance, that the law and the honor of the court would permit him so to do; for the conduct of the clerk had been entirely correct. It is to be said, that he disclaimed any agency in this interposition, and that he was himself ready to meet the charges as they were

made. The relators insisted upon their right to prosecute the case, and to make reference to the prosecuting attorney. But however the court decided, the respondent now disqualified himself for conducting the above case. His declaration just made; and if the court deemed an objection necessary to the counsel, they could make a special order. The court concurred in this view, ordered the complaint to be filed, and pointed *Messrs. Storer and Walker* to conduct the case.

Read, W. S. Groesbeck, and Robert B. Warden, counsel for the respondent, said they were ready to appear at a hearing, and read the following paper, as their answer, which they asked to have filed:

DEMURRER AND ANSWER.

V. THE STATE OF OHIO, on the relation of **Lewis Broadwell, George W. Runyan, and John L. Scott**.

Answer of Edward C. Roll, clerk of the court of common pleas for the county of Hamilton, Ohio, to the information or petition of Lewis Broadwell, George W. Runyan, and John L. Scott, relators, filed in said court.

I, the undersigned, do hereby certify, that the said Lewis Broadwell, George W. Runyan, and John L. Scott, relators, do not confessing the matters and things in the said information, to be true, in manner and form as charged, nevertheless, the court, that the said information is not sufficient to sustain this court in exercising jurisdiction over him, as charged, and for the purpose therein set forth.

And in protestation, he proceeds to answer the petition.

That the apportionment and division of Hamilton county, Ohio, at the last general election, was made in such a manner, that said relators were candidates for office, as therein provided, and that they received a majority of the legal votes at the said election—or that they, or either of them were elected to any office—or were entitled to receive from him, as clerk, the office of clerk of the court of common pleas for the county of Hamilton, Ohio, on to any office. On the contrary he withholds his assent to the material statements in said information, as they are made, and without adopting a more formal contradiction, he protests, with said relators, upon them all.

That the court of common pleas for the county of Hamilton, Ohio, of which this court over which you preside, and represents the county of Hamilton, Ohio, years ago, he presented the necessary certificate of

qualification from the judges of the supreme court, and was duly appointed such clerk. From that time to the present, he has endeavored to the best of his abilities, to discharge all the duties devolved upon him as such officer, and has done so without complaint of any kind from any one, except in the case now before the court.

Your respondent need not explain to your honors, how arduous and difficult are the duties of his office, and how various in their character, but would say, that he is required by law to do many things which are never brought before the court, in reference to which it is not contemplated he shall take the advice of the court, and where it would seem to be improper and embarrassing to the court, in many instances, to consult and advise with them. In some cases, it has appeared to him, his duties were purely ministerial, in others of a mixed character, requiring the exercise to some extent, of his own judgment.

Among others, he would say he has always supposed such to be the case to a considerable degree in what he is required to do under the present election laws of the state of Ohio. He need only refer your honors to those laws, intricate and conflicting as they have now become, in illustration of his meaning.

He would further represent, that after he had been acting as clerk for several years, having, during that time, as he hopes and believes, discharged all his duties, embracing those under the election laws, with entire satisfaction to all without complaint, an act was placed on the statute book, on the 18th of February, 1848, entitled "an act to fix and apportion the representation of the general assembly of the state of Ohio," which in its application to Hamilton county, gave rise to much discussion and division of opinion. Your respondent makes no reference here to the manner of its being placed on the statute book, but to that part of the act itself, which applies to the county of which he was then and is now clerk. Your honors well remember how serious and
125 widespread was the controversy, which arose immediately upon the publication of that act, and which has been kept up throughout the state, to the present hour. Jurists the most profound and statesmen the most eminent, without regard to their politics, and in the utmost candor of judgment, have divided upon the constitutionality of that part of the act which applies to the county in which your respondent is clerk.

Your respondent would further say, that in due time an election came on in said Hamilton county under said act. The judges of said election, the voters at said election, and all concerned, were alike embarrassed and divided in their interpretation of it, all which is well known, and can be made to appear from the returns of said election filed in the office of which your respondent is clerk.

Your respondent further states, that in the discharge of his duties in connection with said election, duties such as those referred to in the petition of the relators, he made out his abstract of the votes according to the returns, and gave certificates of election to those who had the highest number of votes. He represents that in his conduct at that time, he endeavored to and did proceed, as he hopes and has always believed, according to the constitution and laws in force. He refers to said election and his conduct as clerk at the time, because he has pursued the same course, in some particulars, in connection with the election referred to by the relators, which was the second one under the act aforesaid, and precisely similar as to the offices of senator and representatives of the general assembly of the state of Ohio, with the former one. And in explanation

of his conduct, your respondent here refers to the poll books, the abstracts and certificates made out at said two elections.

It is unnecessary here to state more at length, the difficulties which said apportionment act, in its application to Hamilton county, gave rise to. Required by law, as your respondent was, to perform a certain service in connection with said election, he did perform it honestly, sincerely, and to the best of his abilities, and as he believes, according to the constitution and laws.

Respondent admits, that in what he has done as clerk, he may not have carried out that portion of said apportionment act, which it is claimed by some, requires of him to make out certificates of election to those who have the highest number of votes in the districts as they are called, into which the county is divided, but admits he gave such certificates to those who had the highest number of votes in the county, and herein he believes may be found the whole and sole cause of the complaint and accusation of the relators, but for explanation of his conduct, he again refers, in this connection, to the poll books, the abstracts and certificates.

Respondent further states, that in the first instance and before he would take any step as clerk, under said act, well aware of the great difference of opinion in regard to the same, and deeply impressed with the responsibility of his position, and unwilling to confide solely in his judgment, he consulted persons who were well qualified to give him counsel on the subject, and finally acted according to his own and their opinion. Respondent would repeat, it was not a question to submit to the court, in session, and as a court, but would state, that he was given to understand what was the opinion of some of its members, and in what he did, for which he is now arraigned as regardless of his oath of office, and a wanton violator of the law, he but acted as he has always supposed, according to the opinion of at least half the members of this court, at that time.

Respondent further represents that the part of said act, to which he has referred, came before the legislature of this state, after said first election, at which he had given certificates to George E. Pugh and Alexander N. Pierce, who had received the highest number of votes in the county, and not to those who had received the highest number in a district of said county, for which they were candidates, and claimed certificates accordingly. The right of said Pugh and Pierce to take their seats as members of the legislature, under such circumstances, and the constitutionality of the part of said act herein referred to, came before 126 that branch of the legislature, of which the parties contesting claimed to be members. Your respondent has always supposed they were a proper tribunal to discuss and decide the question; and after protracted discussion and deliberation, they did decide it, and on the 26th of January, 1849, passed a resolution to be found in their journal, of which the following is a copy:

"Resolved, That George E. Pugh and Alexander N. Pierce are constitutionally elected to the office of representatives of this general assembly, from the county of Hamilton, and that they therefore be now permitted to take their seats." The persons named took their seats, and occupied them as members to the close of the session.

Your respondent further states, that a second election under said law, and the one referred to in the petition of the relators, came on. The returns of the election in this county were filed in his office, and he made

out the abstracts and gave the certificates of election to those who, according to the same, had received the highest number of votes in the county, and not to those who had received the highest number in any section or district of the county. But for a fuller explanation of what he has done, reference is made to the poll books, the abstract and certificates. Respondent states he did on this occasion as he had always done before—the cases were similar—the form of certificate not a new form contrived by himself, but the same he had given the year before, and always before.

And now, in conclusion, respondent would say, that in all he has done, he has acted conscientiously, and as he believes to be right and according to law. That he has acted wilfully or unjustly—that he has acted regardless of his oath and duty—that he has knowingly and wantonly disobeyed, obstructed, or put at defiance the laws of the land—charges, which have been made by the relators, he declares to be false and grossly libelous.

Respondent regrets that said relators have thought proper to lay against him so heavy accusations. It may be, that he has erred in his judgment. It may be, that the general mind on this subject will change. It may be, that the relators are wiser and profounder on questions of constitutional law, than their day and generation, but that the motives of your respondent were corrupt, or that, in what he has done, he has acted in bad faith and regardless of duty, are assertions wholly untrue. Your respondent is charged with usurpation of power. On the contrary, he would say, that during all the time he has been in office, he has done nothing so unpleasant and embarrassing, and that he would most cheerfully have avoided it, if it had been possible.

But it was not possible, and he has done what the law required of him, nothing more, and not otherwise, as he believes, than he should have done. No court or legislature has decided otherwise, and respondent had no other or better means of determining the right than those he had consulted. The laws of the land furnish him no authority to consult, and enjoin upon him no judgment which he is to follow. If the accusation of the relators is sustained, and the prayer of their petition granted, your respondent will be made to suffer for an honest error of judgment, if error it should prove to be, in the discharge of what has become the most unpleasant duty of his office.

And having fully answered, this respondent asks that the said complaint and specifications be dismissed, or that he may have the right of further answering, if necessary.

E. C. ROLL.

THE STATE OF OHIO, HAMILTON COUNTY, ss.

Personally before the undersigned, one of the associate judges of the said county of Hamilton, came Edward C. Roll, who, being duly affirmed, says, that his foregoing answer is true in substance and in fact, and further says not.

Sworn and subscribed before me, this 5th November, A. D. 1849.

ROBT. MOORE, *Associate Judge*.

E. C. ROLL.

127

The counsel for relators here insisted, that as this paper contained a demurrer and an answer to the entire complaint, the demurrer must be first disposed of. After some discussion, the court announced that in order to bring the case to a hearing upon the full merits, they would, *pro forma*, overrule the demurrer. The following paper,

signed by all the counsel, was then read and filed, as containing sundry facts upon which all agreed.

AGREED FACTS.

It is admitted, that Lewis Broadwell was understood to be a candidate for senator, and George W. Runyan and John L. Scott were understood to be candidates for representatives, at the October election last past, for what is claimed to be the first district of Hamilton county, composed of the first eight wards of the city of Cincinnati, as set forth and prescribed in the act entitled "an act to apportion the representation of the general assembly of Ohio," passed February 18, 1848, but received votes generally, as shown by the returns, which see.

That said Roll, with the aid of the justices, counted the votes cast in the whole county for senator, and representatives also, without reference to said first district, and gave the certificate to W. F. Johnston as senator, and to Pugh, Roedter, Pruden, Long and Bennett, as representatives.

That on the 17th day of October, A. D. 1849, the said Broadwell, Runyan and Scott, verbally demanded of said Roll, as clerk of said court, their certificates, as required by law, claiming, that the said Broadwell had received the highest number of votes as senator, and said Runyan and Scott the highest number of votes as representatives, in said district at the said election—and that said Roll then and there refused to deliver the same, on the ground that he had already given the certificates for each of said offices—to the said Johnston as senator, and to said Pugh, Pruden, Long, Roedter and Bennett, as representatives, and that he did not recognize the right of the applicants to demand the same.

T. WALKER,
B. STORER,
N. C. READ,
W. S. GROESBECK,
R. B. WARDEN.

The only other evidence offered, consisted of the official abstracts of the votes for the years 1848 and 1849, and the poll books for those years; those for the latter year being offered by relators, and those for the former year by respondent.

These abstracts are too voluminous to admit of being copied in this report. And it is deemed sufficient, for understanding the points made in the argument, to say that they contained no recognition by the clerk of the division of Hamilton county into two election districts for senator and representatives; that the footing up of each column was for the entire county; that by footing up the first eight wards of the city separately, Spencer and Runyan, in 1848, and Broadwell, Scott and Runyan, in 1849, had a majority of the votes given in those wards, although not in the entire county; and that the board of canvassers were on neither occasion unanimous in their certificate appended to the abstract; the two justices in 1848 certifying that Spencer and Runyan were duly elected representatives for the first district; and one of the justices in 1849 certifying that Broadwell had the highest number of votes for senator, in that district.

The case was then argued by each of the counsel above named. The reporter has been furnished with no memoranda by the respective counsel, except a statement of the points of defence by Judge READ; and for the rest is compelled to rely upon his own notes. From these he will

only attempt to state briefly the points made and authorities cited generally, on each side.

Storer & Walker, counsel for the relators, made the following points—

The 9th section of the 3d article of the constitution of Ohio, provides as follows :

"Each court shall appoint its own clerk for a period of seven years; but no person shall be appointed clerk, except *pro tempore*, who shall not produce to the court, appointing him, a certificate from a majority of the judges of the supreme court, that they judge him to be well qualified to execute the duties of the office of clerk to any court of the same dignity with that for which he offers himself. *They shall be removable for breach of good behaviour, at anytime, by the judges of the respective courts.*"

As to the meaning of the term "*behaviour*" as here used, it is synonymous with *conduct*. The old Latin phrase, used in commissions, was *dum bene se gesserit*, while he shall conduct himself well. In Richardson's Dictionary we have the following :

Behave,	}	To have, to hold, to bear, to conduct, to manage.
Behaving,		
Behaviour,		

And he gives, with many others, these two illustrations:

"The concluding clause, this is the law and the prophets, has by some been interpreted to mean, this is the sum and substance of all religion; as if religion consisted solely in *behaving* justly and kindly to our fellow creatures, and beyond this no other duty was required at our hands." Porteus, vol. i, sec. 7.

"We are not, perhaps, at liberty to take for granted, that the lives of the preachers of christianity were as perfect as their lessons; but we are entitled to contend, that the observable part of their *behaviour* must have agreed in a great measure with the duties which they taught." Paley, Evidences, c. 1. p. 1., 11.

Now the charge made in the complaint is substantially this—that the clerk, knowing that the relators had the highest number of votes in the first district for their respective offices, refused to give them a certificate of election, and gave it to others not having the highest number of votes in that district. And the truth of this charge is not disputed. Is this a "*breach of good behaviour*," as above defined? This is the sole question before the court; and to decide it we must look to the law, which prescribes the clerk's duties connected with elections. We first read from the first and second sections of the last apportionment law of 1848 (46 Ohio Laws, 57, 60), which provide as follows:

"SEC. 1. That the general assembly of this state shall be composed of thirty-six senators and seventy-two representatives, to be appointed as follows, to wit: To the county of Hamilton, two senators and five representatives to be elected as follows: So much of said county of Hamilton as is comprised within the limits, as now constituted, of the first, second, third, fourth, fifth, sixth, seventh and eighth wards of the city of Cincinnati, shall compose the first district, and shall be entitled to one senator and two representatives; the senator to be elected in the years eighteen hundred and forty-nine and eighteen hundred and fifty-one; so much of said county of Hamilton as is not included in the first district shall constitute the second district, and shall be entitled to one senator

and three representatives; the senator to be elected in the years of eighteen hundred and forty-eight and eighteen hundred and fifty.

"SEC. 2. *The poll books of votes given for senator and representatives in the first district of Hamilton county, shall be returned to the clerk of the court of common pleas of said county, and be opened, counted and certified, as one district, in the same manner that the poll books of an entire county are now by law required to be opened, counted, and certified for members of the general assembly, and the poll book of votes given for senator and representatives in the second district of Hamilton county, shall also be returned to the clerk of said court, and be opened, counted and certified in the manner aforesaid. And in the discharge of the duties aforesaid, all officers shall be under the penalties by law provided in other cases of returning, opening and certifying the votes given for senators and representatives of the general assembly.*"

These provisions are free from all ambiguity, and if disregarded it must be done knowingly and wilfully. The first eight wards of the city are made the *first district*, and the votes therein given are required to be *returned, opened, counted and certified, in the same manner as is now by law required for an entire county.*

To show what the then existing law required for entire counties, we read portions of the 23d, 24th, 40th and 41st sections of the election law of 1831 (Swan 210, 314), which provide as follows:

"SEC. 23. That on the sixth day after the election (or sooner, in 130 case all the returns shall be made), the clerk of the county taking to his assistance two justices of the peace of the proper county, shall proceed to open the several returns which shall have been made to his office, and to *make abstracts of the votes in the following manner, etc.*

"SEC. 24. *In making the abstracts of votes aforesaid, the justices and clerk shall not decide on the validity of the returns aforesaid, but shall be governed by the number of votes stated in the poll books; but no paper shall be received as a poll book of any township, unless delivered at the clerk's office by one of the judges of the election held in such township.*

"SEC. 40. That the clerk and justices, or judges, shall declare the person or persons having the highest number of votes for senators or representatives of the general assembly, duly elected; subject to an appeal to that branch of the legislature to which any person may be returned; when an election is contested, provided notice of such appeal to said court, be entered with the clerk thereof, within twenty days from the day of election.

"SEC. 41. That the clerk shall make out, for each of the senators and representatives to the general assembly, who have the highest number of votes given, a certificate of his election, and shall deliver the same to the person entitled thereto, upon demand, without fee; and he shall also make out for any candidate or elector of his county, an abstract of votes as aforesaid, upon being paid twenty-five cents therefor."

We also refer to the 48th section of the same law, providing a penalty of \$200 for neglect of duty by any officer. (Swan, 315); and the 6th section of the judiciary act, prescribing the clerk's official oath, (Swan, 223).

Now taking these provisions of the election law of 1831, in connection with those of the apportionment law of 1848, and making the modifications therein required, the latter law so far controlling the earlier, the clerk's duty in this county is left free from all doubt or uncertainty. He is bound to treat the first eight wards of the city, declared to compose

the first district, as an entire county was treated under the former law, and to make the abstract and give the certificate accordingly. This he has confessedly refused to do, and thereby we say, has been guilty of a breach of good behaviour, which requires his removal. For this court cannot permit one of its subordinate officers, for whose appointment and good behaviour the constitution has made the court responsible, to remain in office, after a known, wilful and acknowledged violation of the law, and especially a law of such vital importance as the election law, so deeply affecting the character and permanence of the government, and by which the clerk, if tolerated in his misconduct, may, of his own mere motion, effectually disfranchise a majority of the voters of the county or district. Because, the effect of the certificate of election has been to entitle the holder, in the first instance, to his seat, and this may be conclusive for the entire session.

1 Black. Com., 137; Edward's case, Contested Elec. Cases, 92; Richard's case, Contested Elec. Cases, 45; Spalding's case, do., do., 159; Letcher's case, do., do., 709.

The answer intimates that the clerk was acting in a judicial capacity. But the statute above quoted expressly denies this. Nor are his functions judicial in their nature. They are, to open, count, and certify the votes returned, without judging of their legality; and in this, there is nothing more of a judicial character, than in the acts of a bank officer, when he opens and counts a package of notes, and issues a certificate of deposit. But a sure test is that a *mandamus* would lie to compel the clerk to issue the proper certificate; and this only issues to ministerial officers. We hold the clerk to be a mere ministerial officer charged with the simple duty of executing the laws applicable to his functions, according to their plain letter, and intrusted with no discretion to modify or depart from them in the smallest particular.

Becker v. Platt, 7 Johns., 554; *Morbury v. Madison*, 1 Cranch, 165; *Tracy v. Swartwout* 10 Peters, 94; *Lincoln v. Hopgood*, 11 Massachusetts, 355.

The *quo animo*, the motive for disobeying the law, is of no consequence. It is enough that the law is violated, and a wrong thereby done to others.

Jeffries v. Ankeny, 11 Ohio, 372; *Blanchard v. Stevens*, 5 Metcalf, 298; *Scaman v. Patten*, 2 Caines, 313.

We might insist that the breach of good behavior need not be connected with the duties of the clerk's office, for it has so been held. (*The State v. 2 Martin n. s.*, 688.) But here the malversation is in the discharge of his functions as clerk. Should it be said that the court have no control over his conduct under the election law, we reply that by appointing him clerk they have placed him in a condition to do the wrong complained of, and hence are responsible for his removal, there being no other power to remove him. To permit him to remain in office would be to sanction the wrong, and invite a repetition of it.

132 Again, it is intimated in the answer that the apportionment law was not duly enacted. We reply that this question cannot here be mooted. And if it could, the act has been everywhere recognized as a law, so far as relates to the number of senators and representatives for Hamilton county; and must, therefore, so far as this question is concerned, be regarded as a duly enacted law.

It is also claimed in the answer, that this law is *unconstitutional*, so far as it undertakes to divide the county into districts. If this be granted,

it does not follow that the clerk had a right to disregard it. He is not empowered to judge whether a law was duly enacted, or is constitutional. His duty is to take both for granted. The only tribunal authorized to decide these questions is the judiciary. The legislature have expressed their opinion by passing the law. The executive has no voice in the matter, unless in the exercise of the veto power. A subsequent legislature may repeal a law for any reason they may deem sufficient, but cannot adjudicate upon the question of constitutionality. The only rational doctrine is, that every law is to be treated as constitutional, by every citizen, whether in a private or official capacity, until it has been judicially annulled. Any other doctrine would lead at once to anarchy. Just as properly might the clerk refuse to issue an ordinary writ, from constitutional scruples, as to refuse to issue a certificate of election, from such scruples. And we regard the very assumption of the clerk, in this case, to decide for himself the question of constitutionality, as an act of gross misbehavior.

But if the question become material, we hold that the division of a county into districts is within the constitutional power of the legislature. As to *senators*, the sixth section of the first article is explicit—"Senators shall be apportioned among the several counties or districts to be established by law," etc. And it is enough for our purpose that the clerk refused a certificate to the senator elect of the first district. We shall not, therefore, argue the question as to representatives. Indeed, the question of constitutionality does not arise in this case; for the conduct of the clerk is equally wrong, whether the law be constitutional or not. He chose to place his fidelity to his party above his fidelity to the law. He did this knowingly, deliberately and repeatedly. This is not a mere mistake of duty, or an error of judgment, but a wilful abuse of power, in defiance of law. In other respects we admit that the clerk has been 133 a meritorious officer; but in this we charge him with a high handed act of misbehavior.

Finally, the answer relies upon the resolution of the last house, admitting Pugh and Pearce to their seats, to the exclusion of Spencer and Runyan. By what flagitious means this result was brought about, is matter of public history; and this should take from that decision all authority as a precedent. But we deny that the decision of the house could under any circumstances be binding upon this court. First, they were not trying the clerk for misconduct. And, secondly, if they could properly pass upon the constitutionality of the apportionment law, which we deny, this would not justify the clerk in assuming to do so.

Should it be said that we have other remedies, such as an indictment for the penalty, an action for damages, a mandamus, or an appeal to the respective branches of the legislature, our reply is, that having a right to choose, we have preferred this. We think the lesson taught by the removal of this clerk, for the cause assigned, will be most beneficial to the cause of law and order, which his conduct in the premises has done so much to subvert.

Messrs. *Read, Warden* and *Groesbeck*, counsel for the respondent, made the following points (as stated by Judge Read):

1st. The clerk having performed duties enjoined under the election laws, cannot be impeached and removed, for breach of good behaviour, in the absence of all corrupt motive or malice. 2 *Caines R. Seaman v. Patten* 312.

2d. An officer, whether ministerial or judicial, sworn to perform according to the best of his ability and understanding, is not liable for mere mistake of judgment. *Ibid.*

3d. The office of clerk is created by the constitution—the tenure not during the good pleasure of the court, but good behaviour in office, and on application to remove, the court will both judge of the cause and propriety of removal. 1 Dana's R., 595.

4th. The phrase "breach of good behaviour," is not defined in the constitution nor by statutes, but cannot be extended to general behaviour, but must be limited to good behaviour in the discharge of the duties of clerk in respect to the court itself. 1 J. J. Marshall 121, *Com. v. Chambers*; 1 Hardin 229, *Com. v. Barry*.

5th. The power of the court to remove depends upon "a breach of good behaviour" in the clerk in his office as clerk—and a proceeding to remove, including impeachment and forfeiture of office, is criminal—and the corrupt motive which constitutes the act complained of misbehavior, **134** must be proved and cannot be inferred from the act itself, unless the act is criminal *per se*—and the specific act of misbehavior must be stated and proved. *Ledbetter v. State*, 10 Alabama 241; *Com. v. Chambers* 1 J. J. Marshall, 120.

6th. The general power to remove the clerk for breach of good behavior, is limited to conduct in the discharge of the duties as clerk necessary to the action of the court itself, and the court have no power to punish the clerk by removal for misbehavior in other respects, or in performance of duties imposed on him by law not connected with the court, whether they are enjoined under penalty or not. 1 J. J. Marshall 121; *Com. v. Chambers*, 1 Hardin 229, *Com. v. Barry*.

7th. The duties required of the clerk under the election law are totally disconnected with the court, and are in reference to a subject matter over which the court have no original control, and which might as well have been assigned to any body else as the clerk—and being confided to the clerk, his decision is absolute and exclusive, except questioned in the appropriate mode and he is protected in it. *Allen v. Blunt*, 3 Story, 742.

8th. The clerk and justices under the election law, act in a judicial capacity, from whom an appeal lies to this court in cases of county officers, and to the appropriate branch of the legislature in respect to senators and representatives: And hence have judicial indemnity. 6 Humphrey 230, *Haggart v. Bigby*; *Briggs v. Wardel*, 10 Mass., 356; *Lincoln v. Hapgood*, 11 Mass., 350; *Dillingham v. Snow*, 5 Mass., 350; *Colman v. Anderson*, 10 Mass., 105.

9th. That the alleged apportionment law was never constitutionally passed.

10th. That so much of said apportionment law as divides the county of Hamilton into districts is unconstitutional—and a part of a law may be unconstitutional and the rest valid. 2 Blackford, 8; 1 Bay, 93.

11th. That it is the right and duty of the clerk to disobey an unconstitutional law, and that a reasonable doubt of the unconstitutionality of a law will protect the clerk. 3 Littell 319, *Com. v. Arnold*.

12th. That a right construction of the apportionment law in view of the constitution and other acts upon the same subject, requires the clerk to certify precisely as he did.

13th. That the remedy against the clerk if he has corruptly neglected to perform his duties under the election law, is by indictment and an action of debt for the penalty prescribed. 135

14th. That the appropriate remedy to compel the clerk to issue a certificate to electors if entitled, is a writ of mandamus from the supreme court.

15th. That the matter is *res adjudicata*—the only tribunal having power to determine having decided in favor of the construction put on the alleged apportionment law by the clerk, by the admission of Pugh and Pearce to their seats last winter.

16th. That it is the right and duty of every citizen to disobey an unconstitutional law.

17th. That a citizen as well as officer disobeys and resists a law upon the ground of unconstitutionality at his peril, if it prove to be constitutional.

18th. An officer sworn to support the constitution, and act according to the best of his ability and understanding, is not liable to criminal punishment for disobeying a constitutional law which he had reason honestly to believe to be unconstitutional.

19th. That the whole power of the government results from the people individually, and every individual is charged with the duty of resisting its abuse.

OPINION OF THE COURT, BY HART, PRESIDENT JUDGE.

To guide us in a correct decision of this case, we have been able to find but few precedents—none in this state. This, however, we do not regret, but on the contrary rejoice that it is so, for it affords some evidence that official misconduct is of rare occurrence.

The complaint in this instance does not come before the court in the form of an indictment, but like all other impeachments, is, in its nature, a criminal proceeding—criminal, because if sustained, the accused is sent forth stripped of his office, and stamped with the brand of official misconduct.

The proceeding thus viewed, upon what principle shall we proceed in our investigations of the charge? What rules shall we adopt in passing upon the facts? We cannot presume the clerk guilty; nor can we adjudge him guilty upon evidence not adduced at the hearing of the complaint, and which he has had no opportunity to meet. Upon every principle of law and justice, we are bound to presume innocence, and upon that presumption act, until the contrary is established by clear and satisfactory evidence.

Before proceeding to the proofs in this case, it is proper to advert to the nature of the office and the tenure by which it is held, as there seems, to the court, to be some misapprehension upon the subject. 136

The clerk is not a creature of the the court but of the constitution. The 9th section, third article, confers upon the court the power to appoint the officer, but this can only be exercised under a defined limitation. We can appoint no man permanently who has not a certificate of his qualifications from three judges of the supreme court. He is appointed for seven years, and not during the pleasure of the court. And for that period when appointed, he has the right—the legal right—to exercise the duties of the office and receive its emoluments, unless removed—not capriciously by the judges who, for the time being, com-

pose the court—but by a deliberate sentence adjudging him guilty of misbehaviour. The power to remove him is not inherent in the court; it results only from a judgment of misbehaviour fairly and legally pronounced.

Having thus glanced at the nature of the office, and the tenure by which it is held, let us enquire into the character of the duties which are devolved upon the officer. That character is manifestly twofold—such duties as connect themselves with the court in its administration of the law, and such as do not so connect themselves. In respect to the first we can order and direct the clerk in advance, and they always relate to matters over which the court has jurisdiction. But in respect to the second, we can give the clerk no order—no direction, because they relate to subjects over which this court has no jurisdiction. To this latter class, we think, may be referred the particular duty out of which this complaint has arisen. The granting of a pedlar's license, or a license to keep a ferry, or to be married, is of the same character.

In all the duties of the first class, to which we have referred, the clerk acts as a ministerial officer merely; whilst of the various duties devolving upon him of the second class, some few assume the shape of judicial functions. Now, in the view we have taken of this case, it is wholly unnecessary to determine upon the character in which the clerk acts under the fortieth section of the election law. If, however, it were necessary—if we could not otherwise dispose of the case—we should not hesitate to decide that in making the declaration, required by that section, the clerk and justices act judicially. It is not a test of judicial authority that the officer is called a judge, nor is the importance of the question decided any test. The clerk is required to call to his assistance, justices of the peace, and in the absence of the clerk, 137 the associate judges of the court must perform the duty. The delivery of certificates is only an execution of the decision so made, and must follow it. We think, therefore, that the declaration of the clerk and justices—being an expression of their opinion of a fact—is a judicial act. But this is not material. We hold that no man, holding office under the constitution of this state, can be removed for an act, ministerial or judicial, unless done with a corrupt or dishonest motive. Mere mistake, or error of judgment is not, in the opinion of the court, a breach of good behaviour, within the meaning of the constitution, to justify an expulsion from office.

The legislature has given but one illustration in our statutes of a breach of good behaviour. The law of 1831 (Swan, 403), provides that if a clerk does not make up his records within six months from the decision of a case, the court shall remove him. Does this mean that if the clerk has been informed by the proper deputy in charge, that the records have been made up, and so honestly believes, he shall nevertheless be removed? We think not. We should construe this to mean an unreasonable neglect—otherwise we should, upon a mere quibble, stamp a man with disgrace, who had acted honestly. If the clerk should wantonly refuse to obey us in one of our orders, it would amount to dishonesty or corruption. It would obstruct our business as a court, and we should be obliged to remove him. Besides we could not get along with the administration of justice without doing so. No one else could record our judgments, and the business of community would be thrown into confusion. But what he does out of court, ministerial or judicial, not connected with our duties, he does it at his own peril. Penalties are de-

nounced—indictments, actions by the party injured, and payment of costs. Should he behave dishonestly or corruptly in any matter, even in granting a pedlar's license, we should remove him, and thus superadd to the other penalties, that of disgrace and loss of office.

How stands this case as it has been presented to the court? No witnesses have been examined, nor depositions read, but we are left for the facts upon which to base our judgment, to the written complaint, the answer of Roll, and an agreed statement of the facts. (Here the statement was read.) There is, it will be seen, no evidence furnished of a dishonest or corrupt motive. It is *not even charged*, and both of the learned counsel for the relators have concurred in bearing testimony to the general good conduct of the clerk. Can the court adjudge this officer guilty of a breach of good behavior and remove him from office upon a state of case in which he is not even charged with dishonesty and corruption? 138

The learned counsel who opened the argument for the relators, Mr. Storer, cited several cases of actions against judges of election, which were sustained without proof of corrupt motives. But all these cases go upon the ground that the party injured has no other remedy, and that the decision of the judges of election was final. Now there are other remedies than this, to which the relators can resort. A prosecution by indictment, or an action on the case, would appropriately test all the questions at issue between the relators and the respondent. They cannot apply for a mandamus, says the counsel, because certificates have been delivered. But that would be no answer—because the clerk has given certificates to persons not elected, and certificates of a particular kind, are the persons who are elected prevented from having another kind of certificates, and such to which they are entitled by the law of the land? A mandamus will lie now as well as before the certificates were delivered. And then, the certificates are not conclusive, nor is the clerk's action final. The certificates give an advantage, we know, but if the legislature be honest and decide as judges should—that advantage is trifling. The 40th section of the election law gives an appeal to the house for which the member is elected. That house is a court, by the 8th section of the 1st article of the constitution, to decide the question. It may not meet as peaceable courts do—it may not act honestly and fairly as *courts should act*. When the judges of election refuse a vote, that is the end of it. There is no appeal. There is no remedy but an action at law to establish the elector's right. In these respects then, this case altogether differs from that.

Reference has been made to the action of the clerk last fall. That matter is not before the court. This complaint is not based upon it, and did not even refer to it. The answer mentions it, and counsel have spoken of it freely. There was connected with that transaction, an eminent member of this bar, a profound lawyer, and consummate advocate, Judge Spencer, who formerly occupied this seat—all the remedies now open were then open, and yet Judge Spencer, and his worthy colleague, Mr. Runyan, appealed to the legislature—not to this court. It has been said by counsel that the legislature, upon that occasion, acted corruptly, and decided contrary to law. That is not our fault. It is the fault of the people that they did not select and send to Columbus men who would decide an important question of law, without regard to their personal or political advantage. 139

The learned counsel who closed the argument for the relators, Judge Walker, modified the admission of his colleague. He declared his BELIEF that the clerk acted from partisan motives. Now had we evidence of this instead of the mere belief of counsel, we would remove the clerk at once. We have no right to resort to evidence within our own breasts, and which the clerk has had no opportunity to rebut.

If any member of this court knows a material fact in any, the most trifling case, we expect him to be called as a witness, and do not expect to decide upon it without giving the accused a chance to disprove or explain it. Were the clerk removable at our pleasure, and not by solemn judicial proceeding, we might do otherwise than we shall do. But he swears in his answer that he has acted honestly and conscientiously. We have no evidence to contradict his oath. We leave it to God and himself to decide. The majority of the court think it their duty to adjudge, and do adjudge that the complaint be dismissed.

DISSENTING OPINION OF JUDGE SAFFIN.

I am constrained to dissent from the opinion of the majority of the court, which has been delivered. I cannot concur in their reasoning or in their conclusions. If I do not answer the various points which the president judge has advanced, I can only say, that I have had no opportunity of fully understanding the grounds upon which his opinions would be placed. I am aware of the disadvantages under which I shall attempt to express my views in opposition to the learned and elaborate opinion that has fallen from the president judge. He is a lawyer, I am not. But this is an occasion which demands of every member of the court, that he should stand by and maintain the honest convictions of his *own mind*.

The specifications against him are substantially as follows, viz: That he, as clerk, has deliberately and knowingly refused to execute the law which requires him to give certificates of election to the candidates who received the highest number of votes in the first district, for the senate and house of representatives, but has given said certificates to other
140 candidates, who had not received the highest number of votes for said offices, in said district.

These specifications are the *mode* which has been adopted, on the present occasion, to bring the subject of them formally before the court. The clerk is an officer of the court's appointment. By the constitution he is made answerable to the *court* for his "good behaviour." His conduct is cognizable by the court, *with or without specifications*. But when the breach of good behaviour does not happen in the presence of the court, the court may perhaps with propriety wait for the exhibition of charges before taking action upon it,

But if the "breach of good behaviour" is once brought home to the knowledge of the court, they may, and ought to, act upon that knowledge and remove him.

When the court, therefore, is once possessed of the facts of the case, it is futile, in my humble opinion, to suppose that counsel can relieve the court of any responsibility by their admissions of guilt or innocence. It is for the court to determine and act on *its own responsibility*.

And the question to be determined is, whether the conduct of the clerk is "a breach of good behaviour," for which he ought to be removed? This question the court can determine with or without the aid of counsel.

But whether they hear counsel and argument or not, the *court alone must bear the responsibility*. I do not regard this proceeding as in the nature of a criminal prosecution. It is not the *punishment of Mr. Roll*, but the *proper performance of the duties belonging to the office of the clerk of this county*, which is to be secured by this proceeding.

It has been said that the court have no jurisdiction over this matter, because it pertained to a duty of the clerk, which was not connected with judicial proceedings.

But the clerk is appointed by the court, and his appointment is, or ought to be, made with reference to all his legal *duties*; among the most important of these duties, is that which "it is charged," this clerk has refused to perform. The court are, by the constitution, made responsible to the public for his "good behaviour" in office—by the laws of the state, under that constitution, the giving of said certificates to the parties entitled to them, was a part of his duty as clerk.

I cannot conceive how the jurisdiction in the case could have been more expressly given—by the constitution and the laws—than it has been given. It has been given to no one *else*. The doctrine claimed 141 for the clerk would enable him to defeat all elections, by refusing absolutely to return the abstract of votes—or give certificates of election—whenever the result of the elections should not accord with his wishes, and yet there would be no tribunal that could relieve the country from such a tyrant, by *removal*. What is a pecuniary penalty of \$500 in such a case?

It is also said for the clerk that in opening the returns and in making the abstract of votes, and giving the certificates of election to the candidates elect, he has *judicial* authority and can *pass upon the constitutionality of laws*, and upon the validity of the returns, and that he may, therefore, do what he has in this case assumed to do, reverse the decision of the judges of the elections, and give his certificates of election to those candidates who, by the returns, have not received the highest number of votes in the first district.

The law has expressly placed upon the *judges of the elections in the different wards and townships* the responsibility of guarding the polls, and deciding *judicially* upon the validity of votes, and has expressly *forbidden the clerk* to decide upon the validity of their returns. My opinion is, that the clerk is a purely *ministerial* officer, in this, as in all his other duties, and that any other construction would lead to the worst *consequences*. Nothing but the *emergencies of party* ever could, in my opinion, have given birth to such an idea, either in the mind of the clerk or any one else.

Sheriffs, constables, and marshals might as well undertake to return upon their writs, their decisions upon the constitutionality of the laws, under which they were *issued*; or the clerk might, himself, as well go into the same question whenever he is required to issue either *mesne* or *final* process. Very little indeed, would remain for courts to do, and no uniformity or certainty would remain in the administration of *law*. A more perfect state of anarchy and confusion cannot be imagined. Such a method, or rather, such a denial of all method, in the administration of the law, would be a mockery of justice, and a burlesque on government.

It has been said that the act complained of, was the result of an error in judgment, and not of a corrupt purpose, and that however wrong that judgment may have been, and however bad the consequences, the

act itself does not constitute "a breach of good behaviour." It is also claimed that the counsel have admitted the correctness of the motives of the clerk, and that the court are bound by those admissions to hold him innocent of any wrong purpose. On this subject, my opinion is, that whatever counsel may have admitted or denied, the *court will be answerable for their own judgment.*

That when the facts are brought to their knowledge, the court can no longer shield themselves under any man's opinion, and no counsel can admit away those facts. They might as well admit away the common sense, or the conscience of the court. Nor is the court, when judging of the conduct of the clerk, necessarily blind, to what all the rest of the world and the court itself have seen and known up to this moment. It is for the court to form their own opinion of the matter and of the thing done, by the facts brought to their knowledge, and for that opinion they will be justly held responsible, to the general judgment of an intelligent and just community.

This occasion is too serious to deal in the empty language of compliment toward the clerk, when we are bound to determine the true nature of his conduct from the facts.

My judgment of his conduct on that occasion is, *that he knew the law, and knew his duty under it, and wilfully and deliberately refused to do it.*

But it is said that his *motive* was not *corrupt*. My judgment of his motive is, *that he refused to perform his duty for the simple purpose of promoting the political power of his party, and that that motive as effectually unfits him for the station he holds, as if he had been bought with a price.*

The court is called upon to decide whether this is a "breach of good behaviour" in office. On this subject I can entertain no doubt whatever; it is, in my opinion, so gross and unexampled, that nothing but the very *extremity of a political emergency and the most daring legal sophistries could keep him in countenance for a single hour.* I cannot, while sitting here as a judge in a tribunal where *alone* the public can obtain justice for such an offence, by my opinion sanction *that*, as "good behaviour," which I feel and know to be a most flagrant *breach* of it.

It is also said that the law which the clerk refused to execute was never *enacted*, and, therefore, was *no law*. On this subject, my opinion is that the enactment of the law was perfect, and that it is properly printed among the *laws*. If this were not so, it comes to us with all the evidence of its authenticity, which is to be found for any *law* in the statute book.

It is said that the law, dividing the county is *unconstitutional*. If this were so, while the law has not been impeached by any court, it is not the province of the *clerk* to set it aside—nor will the court be likely to justify the clerk on that ground—while the court itself, as far as I know, regard the law as constitutional and valid. The clerk might make that plea for every offence. Indeed, that offender must be cruelly straightened who cannot plead the *unconstitutionality of the law he has broken*. The question is, whether the court ought to *admit* the plea, and if they should admit it, whether the plea is *true*? For if it be *false*, what a farce it is to make it.

I presume that the court is not prepared to hold the law in question *unconstitutional*. If not, they will not be expected to *allow the clerk to set it aside*.

This case is supposed to be one of serious concern to the clerk. Such is undoubtedly the fact, and the court should therefore act with caution. But the people of the state have a far deeper stake in this question than any one man can possibly have. The rights of the public are suspended upon the action of this court; the importance of these rights cannot be magnified. Every good citizen is interested in the maintenance of the *law* of the land, and no part of the law should be more sacred in the eyes of a court of justice, than that which is enacted for the security of the elective franchise. For if we surrender that, we surrender the right most dear to every American citizen.

JUDGE HART'S OPINION IN THE ROLL CASE.

185

This very extraordinary document, published in the last number of this journal from the learned judge's own hand, is worthy of more particular attention than it has, as yet, received. If the principles declared in it be true, the importance of the occasion makes it proper that they shall be invested with any new strength in the estimation of the public, which a free discussion may give them. On the contrary, if they be false, they ought to be exposed.

The opinion is introduced by the following language of the learned judge:

"The complaint in this instance, does not come before the court in the form of an indictment, but, like all other impeachments, is in its nature a criminal proceeding—criminal, because, if sustained, the accused is sent forth stripped of his office, and stamped with the brand of official misconduct.

"The proceedings thus viewed, upon what principles shall we proceed in our investigation of the charge? What rules shall we adopt in passing upon the facts? We cannot *presume* the clerk guilty; nor can we adjudge him guilty *upon evidence not adduced at the hearing of the complaint*, and which he has had no opportunity to meet. Upon every principle of law and justice, we are bound to presume innocence, and upon that presumption act, until the contrary is established by clear and satisfactory evidence."

This language presents two propositions. The first declares the complaint before the court a criminal proceeding; and, being such, the second declares that the respondent cannot be pronounced guilty without proof. As to the first of these propositions, the complaint is declared to be a criminal proceeding, "*because, if sustained, the accused is sent forth stripped of his office, and stamped with the brand of official misconduct.*" This test of what is to be regarded as a criminal proceeding in a complaint like the one before the court, clearly involves the idea that all proceedings must be regarded as criminal which might lead to a clerk's removal, whatever might be the charge. Now, I apprehend the language of the court in this particular is entirely and radically wrong. It necessarily assigns to the word "*misbehavior*," as used in the constitution, a meaning which it could never have been intended it should have. To be sure, a clerk may commit a crime in office for which he shall be removable; but he may also be removable for a hundred acts of "*misbehavior*," which nobody, much less a lawyer, would think of calling *crimes*. 186
An ordinary contempt of court is not a crime; a capricious refusal to perform a particular duty would not be a crime. Innumerable instances of gross misbehavior from incompetency, whether temporary or permanent, might occur, which should be visited with instant and summary removal without a trial—on the same principle that a juror or a witness is punished by fine, and perhaps imprisonment, for the contempt of nonattendance upon the orders of the court—and yet no lawyer would, for an instant, think of classing such instances in the category of *crime*. I repeat, the language of the court in this particular is out of place. It involves a confusion of ideas; and thus discloses an ignorance or perversion of the proper use of terms, which cannot fail to bring distrust upon an opinion that might otherwise, perhaps, be entitled to respect.

The second of the above propositions, viz: That the proceeding being criminal, *therefore*, "the respondent cannot be declared guilty without proof, is more remarkable than the *first*, for two reasons: *First*, because it is a truism which no child would think of disputing; and yet it is put with solemn gravity as though disputed, and as though it were to lead to some great deduction in the case; and *secondly*, because it clearly implies that if the proceeding could be divested of its character of criminality, there might be a conviction without proof; which is simple nonsense.

If the learned judge's language, as above quoted, does not bear me out in this interpretation of him, there is no force in logic or no meaning in words.

But this idea of "criminality" as before intimated, is founded in an entire misconception of the word "misbehavior," in both its meaning and effect. In its *meaning*, because the purpose of the constitution evidently is, as it ought to be, to place under the direct supervision and order of the court, the conduct (whether criminal or otherwise), in all his duties, of its most important ministerial officer. It is evident that the very motion of the wheels of government in the most important of its departments, requires that this power of supervision, to be promptly, and perhaps summarily, exercised, should exist somewhere; and it is equally evident that it can exist nowhere so properly as in the court; and hence the constitution has wisely placed it there, to be exercised under the constitutional responsibilities which appertain to all its other powers. But this misconception of the word "misbehavior," 187 extends as well to its *effect* as to its meaning. In the opinion of the court, this effect extends no further than to the question of guilt or innocence in the *intention* of the clerk—no matter how grossly wrong, absurd, or ruinous may be the act with which he is charged. Now, the truth is, and must be, that the provision of removal for misbehavior *has a paramount reference to the public good*. The most mischievous things may be done by a clerk, through imbecility of mind perhaps, without the slightest suspicion of dishonest purpose, and yet involving the very being of the government. He might, for instance, declare the whole election system unconstitutional; and treating it so, refuse to perform any of the duties prescribed by it; and on a motion to remove him for misbehavior in his office, he is permitted to retain his place, because, forsooth, he cannot be charged with any criminal intent! The proposition is too absurd for grave discussion. The fact undeniably is, that the constitutional provision for removal is intended for fools as well as knaves. It might be a dead letter in a thousand instances of the most vital interest to the general good, if it apply not to the one case as well as to the other.

But to proceed with the opinion. The learned judge says:

"Before proceeding to the proofs in this case, it is proper to advert to the nature of the office, and the tenure by which it is held, as there seems, to the court, to be some misapprehension upon the subject. The clerk is not a creature of the court, but of the constitution.

"The 9th section, third article, confers upon the court the power to appoint the officer, but this can only be exercised under a defined limitation. We can appoint no man permanently who has not a certificate of his qualifications from three judges of the supreme court. He is appointed for seven years, and not during the pleasure of the court. And for that period when appointed, he has the right—the *legal right*—to exercise the duties of the office and receive its emoluments, unless removed—not capriciously by the judges who for the time being compose the court—but by a deliberate sentence adjudging him guilty of misbehavior. The power to remove him is not inherent in the court; it results only from a judgment of misbehavior fairly and legally pronounced."

Now, what is the import of all this language? Why simply that a clerk can be removed by the court only for misbehavior. Does anybody doubt this? Certainly not. The whole statement, therefore, is gratuitous. It is, to my apprehension, utterly pointless in any application, except as it begs the whole question as to the 188 necessity of a criminal intent. In that view, its purpose is sufficiently answered in what I have already said. The learned judge goes on to say:

"Having thus glanced at the nature of the office, and the tenure by which it is held, let us inquire into the character of the duties which are devolved upon the officer. The character is manifestly twofold—such duties as connect themselves with the court in its administration of the law, and, such as do not so connect themselves. In respect to the first, we can order and direct the clerk in advance, and they always relate to *matters over which the court has jurisdiction*. But in respect to the second, we can give the clerk no order—no direction, because they relate to *subjects over which the court has no jurisdiction*. To this latter class, we think, may be referred, the particular duty out of which this complaint has arisen. The granting of a pedlar's license, or a license to keep a ferry, or to be married, is of the same character."

True, the character of the clerk, in relation to his duties, is twofold; referring to duties *within* the court, and duties, so to speak, *without* the court. True again, in respect to the first class of duties, the court may direct the clerk and in the second class, not. But what has this to do with the power of the court to punish the clerk for misbehavior? *He is as much a clerk in the second class of duties as in the first; and is equally liable to misbehave in both; and the constitution has not so*

discriminated between the two, as that he shall be exempt from liability to removal in the one any more than in the other. Hence, before you can place him beyond the bearing of the constitution, you must make him cease to be a clerk; and this the court, in effect, have attempted to do, as will appear from what follows:

"In all the duties of the first class, to which we have referred, the clerk acts as a *ministerial* officer merely; whilst of the various duties devolved upon him of the second class, some few assume the shape of *judicial* functions. Now, in the view we have taken of this case, it is wholly unnecessary to determine upon the character in which the clerk acts under the *fortieth* section of the election law.* If, however, it were necessary—if we could not otherwise dispose of the case—we should not hesitate to decide that in making the *declaration* required by that section, the clerk and justices act *judicially*. It is not a test of judicial authority that the officer is *called a judge*, nor is the importance of the question decided, any test. The clerk is required to call to his assistance, *justices of the peace*, and in the absence of the clerk, the associate judges of the court must perform the duty. The delivery of the certificates is only an execution of the decision so made, and must follow it. We think, therefore, that the declaration of the clerk and justices—being an expression of their opinion of fact is a judicial act."

So the clerk has ceased to be a clerk and become a judge!

Now if this really be so in point of fact; if any law of the legislature has worked this wonderful transformation in official dignity and power, where were the thoughts of the court that they did not instantly pronounce such a law unconstitutional—the constitution having vested "the judicial power of the state, both as to matters of law and equity, in a supreme court, in courts of common pleas for each county, in justices of the peace, and in such other *courts* as the legislature may from time to time establish?" Is Mr Roll a "*court*," established as such by the legislature of the state, to decide in matters of law and equity? If so, show us the law. If so, who is his clerk appointed for seven years? Where does he hold his sittings? Where does he keep the records of his doings and decisions, as all courts are bound to do? *Where is his commission*, issued by the governor, as the law requires?

But, one word more on this point: "We think," says the learned judge, "that the declaration," (referring to the declaration required by the 40th section of the election law), "We think that the declaration of the clerk and justices—being the expression of their *opinion* of a fact—is a judicial act." Wonders will never cease! A declaration of the clerk and justices, that John Stiles received fifty votes, and Thomas Noakes forty—facts stated in official returns, which the clerk and justices had only to open and to declare the contents of—such a declaration—being an expression of their *opinion* of a fact—is a judicial act! If these men could not read English words and figures, there might be some reason for saying that they had an "*opinion*," or would *guess* that the fact stated by the returns was so or so; and thus be said in their declaration to have expressed "their *opinion* of a fact." But as I presume they could read, they would, if they did their duty honestly, simply declare a *fact* and not their *opinion* of a fact, as certified by the returns upon which the law required that their declaration should be predicated.

But listen further to the learned judge:

"But what he does *out of court*, ministerial or judicial, *not connected with our duties*, he does at his own peril. Penalties are denounced—indictments, actions by the party injured, and payment of costs. Should he behave DISHONESTLY OR CORRUPTLY IN ANY MATTER, *even in granting a PEDLAR'S LICENSE*, we should remove him, and thus superadd to the other penalties, that of disgrace and loss of office." 190

The exact meaning of this entire paragraph is not apparent. The first sentence would seem to imply that as, "what the clerk does *out of court*, he does at his own peril," what he does *in court* he does *not* at his own peril. The learned judge could not have meant this. So, the third sentence, appearing to be used antithetically to the first two, would seem to involve the idea, that in case of dishonesty or corruption in the clerk in any matter *out of court*, the court would take jurisdiction and remove, as though such jurisdiction could be taken by no other tribunal. The learned judge clearly could not have meant this; because, in the first two sentences, in the terms "peril, penalties, indictments," etc., he obviously implies that some other jurisdiction might attach, than the summary one of his court. Whatever doubt, however, may exist about the learned judge's meaning in the whole paragraph taken together, there can be, as to the third sentence, no misapprehension of him; and that is, that he would take jurisdiction and remove the clerk in case of

dishonesty or corruption in any matter, whether *ministerial or judicial, out of court* as well as *in*.

With this certainty upon us as to the meaning of the learned judge in one sentence at least, I beg to refer him to what he has before said in reference to "subjects over which this court have no jurisdiction." How can you take cognizance of matters over which you have no jurisdiction? Are you prepared to play the part of a usurper? You have made the clerk a judge; and would you not be usurping power in deciding upon, and punishing the guilt of a judge, in a judicial matter entirely foreign to your own jurisdiction? But further (to recur again to the entire, last quoted, paragraph), in the same breath in which you have said that you would take jurisdiction, and punish in case of dishonesty, you have also said that "what he (the clerk) *does out of court*, ministerial or judicial, *not connected with our duties*, he does at his own peril;" and also that "penalties are denounced—indictments, actions by the party injured, and payment of costs." Now, by the use here of the words "peril, indictments, actions," etc., do you not mean that, in relation to matters "*out of (your) court*," the punishment of the clerk belonged to some jurisdiction *exclusive* of your own? If you do not mean this, all that you have thus said about "indictments," etc., is superfluous. You certainly then mean this, or you, in effect, mean nothing; and yet you say, that notwithstanding all these other provisions for punishment, if you found the clerk dishonest in matters "ministerial or judicial not connected with your duties," you would remove him! On your principles, if you attempted any such thing, you would be guilty of usurpation.

But where, after all—to leave, for a moment, the opinion of the court, and give a new turn to this discussion—where, after all, are the true merits of this case? The agreed case ascertains to the court, that Messrs. Broadwell, Runyan, and Scott received a large majority of the votes in the First District of Hamilton county as established by law. The clerk and justices found this fact on their opening of the returns; but instead of *declaring* the fact so found, they *falsely* declared that other persons were elected, notwithstanding the majority in favor of the persons named, and the clerk gave the certificates accordingly. He refused to give the certificates to the persons elected when properly demanded of him. The relation charges him with having done this "wilfully, unjustly and illegally." Is not this a case of misbehavior? The defense is that the law under which the election was held, was unconstitutional; and therefore the returns from the first eight wards comprising the First District of Hamilton county, were invalid. But the general election law is explicit, that "the justices and clerk shall not decide upon the validity of the returns, but shall be governed by the number of votes stated in the poll book." In the face of this law, the justices and clerk did decide upon the validity of the returns and set them aside, substituting false returns for them. I repeat, was there not "misbehavior" in all this? Shall such conduct, on the simple ground that a dishonest intention *is not proved*, be permitted to stand unimpeached and unpunished, and principles be thus tolerated, the tendency of which must be, to change the whole character of the government?

The great point in this connection is that *the motive must be presumed as an irresistible inference from the fact; as necessarily involved in it; as requiring no proof independent of it*. On any other principle than this, the greatest crimes must go unpunished. Exclamation of honest purpose may accompany the vilest acts; but the acts themselves, from the very nature of the case, must be regarded as conclusive to prove such exclamations false. Society could be governed on no other ground. The robber and the murderer are within this rule; and the most fearful consequences would result from a failure to apply it in all cases of plain and palpable violation of the law.

192 In the opinion under consideration, the learned judge has referred to other remedies to the parties injured, in the form of actions on the case, appeal to the legislature, etc. Admitting this to be satisfactory so far as the parties referred to are concerned, there is another great party to be satisfied in some other way. That party is the PUBLIC. The individual interests involved in the question, are as nothing compared with those of the community at large. These demand protection in matters vital to the existence and action of the government; and to say that these shall be put in extremest peril, because a petty clerk of a court shall not be removed from office, on the ground that, in the act of putting them in peril, he cannot be *proved* guilty of criminal intent, is too absurd and monstrous for a moment's thought. No! The clerk should be removed in such a case—for dishonesty if he be a knave, for incompetency, if a fool.

ARREST FOR DEBT.

144

[Commercial Court of Cincinnati, January Term, 1849.]

MORROW & HAZARD v. FINCH.

Held, That non-residence or want of citizenship of a debtor is not sufficient to authorize the arrest of a citizen of another state, and that to arrest a citizen of another state, under the provisions of the statute of Ohio authorizing a *capias* upon affidavit that the debtor is not a citizen or resident of the state, would be a violation of the constitution of the United States.

In this case, the plaintiffs filed an affidavit of the nature and amount of the indebtedness of the defendant to the plaintiffs, as claimed by them; and also that the defendant was not a citizen or resident of this state, but was a citizen of Kentucky. On this affidavit a *capias ad respondendum* issued, by virtue of which the defendant was arrested and brought into court.

Coffin & Mitchell moved for the discharge of the defendant on common bail. It appeared affirmatively upon the affidavit filed, a copy of which was endorsed upon the writ, that the defendant was a citizen of Kentucky, and they claimed that to arrest citizens of another state, under the provisions of our statute, would violate so much of the 2d section of the 4th article of the constitution of the United States as provides that "the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states." They cited, *Ward v. Morris*, 4 Har. & McH., 431; *Campbell v. Morris*, 3 Har. & McH., 554; *Murray v. McCarty*, 2 Murf. 398; *Gassies v. Ballou*, 6 Peters, 761; *Butler v. Farnsworth*, 4 Washington, 103; *Prentiss v. Barton*, 1 Brock, 391; *Catlet v. P. Ins. Co.*, Paine, 591; *Rogers v. Rogers*, 1 Page, 183, 3 Story Com., 663-5.

T. C. Ware, for the plaintiffs.

By THE COURT: KEY, J. Since this motion was argued, I have consulted the judges of the common pleas, and the judge of the superior court of Cincinnati, and we all concur that the motion should be granted. We hold that to arrest a citizen of another state, under the provisions of our statute making want of citizenship or non-residence in Ohio a cause for arrest, would violate the provisions of the constitution of the United States cited in the argument, and that that portion of our statute must be applied to persons other than citizens of the United States.

*Motion granted.**

*This question was argued before the superior court of Cincinnati, at the October term, 1849, in case of *Blackford v. Lackey et al.* Mr. T. D. Lincoln made an elaborate argument in favor of the construction of the statute authorizing the arrest and imprisonment of a citizen of another state, and cited a large number of authorities. He was replied to by Messrs. W. R. Morris and C. D. Coffin. Judge JOHNSTON, in a very able opinion, sustained the construction given above by Judge KEY. We hope to be able to obtain a full report of this case.

BREACH OF MARRIAGE CONTRACT.

[Supreme Court of Ohio, Belmont County, October Term, 1849.]

[Before Judges Hitchcock and Caldwell.]

JOSEPH CALDWELL v. MARGARET SPILLMAN: IN ERROR.

[Reported by MILLER PENNINGTON.]

Attachment for breach of promise to marry.

On the 11th day of December, 1847, Margaret Spillman sued Joseph Caldwell in assumpsit by attachment, laying her damages at the sum of \$5,000.00; the cause of action endorsed on the writ was "for the breach of a promise to marry."

The substance of the affidavit is that "Joseph Caldwell is her debtor, and is not a resident of the state of Ohio."

Writs of attachment were issued and sent into Belmont and other counties. About the time of the first default, Caldwell appeared by his attorneys (C. C. Carroll and Wm. Kennon, sen.), *for the purpose* of making a motion to set aside the affidavits and writs of attachment, and assigned five causes:

1st. Because the suit is to recover damages for a breach of marriage contract.

2d. It does not appear by the affidavit what sum is due or how.

3d. Margaret Spillman is not the creditor of Caldwell.

4th. It does not appear that Caldwell has any real estate in Belmont county.

5th. The case made will not permit Caldwell to come in and give special bail.

M. Pennington and *W. Shannon* for Margaret Spillman, opposed the motion.

Judge COWEN, delivering the opinion of the court below, said:

This case comes before the court upon a motion to quash the writ. In support of the motion it is contended that as the act authorizing the writ, provides that the defendant may "surrender himself in custody," the affidavit should establish some of the particulars required to entitle the plaintiff to a *capias* by the later act of 1838, "to abolish imprisonment for debt." I do not think that the act "allowing and regulating writs of attachment," is changed by the act "to abolish imprisonment for debt." There is nothing in the latter act showing that its framers considered the former act. As the imprisonment authorized by the attachment law can only happen upon the voluntary surrender of the defendant's person, I do not see that it is in conflict with the letter or policy of the other act.

It is further objected, that the cause of action is not such as will authorize this writ. Do this *praecipe* and affidavit, taking all they contain to be true, show that the relation of debtor and creditor exists between these parties? The first section of the act (Swan's Stat., 88), shows in what cases the writ may issue, subject to the limitations of the 9th section (Ib., page 91). Creditors may have this writ against their non-resident or absconding debtors, if, as provided in the 9th section, the cause arises out of, is founded upon, or sounds in contract, or is a judgment, or decree of some court of law or chancery.

If one man promise another to pay him money, to perform for him services, or to deliver to him property, he becomes a debtor, and the promisee becomes a creditor. Though an action of debt will not lie on a promise to render service, or deliver property, yet the promisor is a debtor, and if he fail to perform his promise, he becomes liable to the payment of damages, in money, to be ascertained and liquidated by a jury. Is not this liability a debt? The limitation of jurisdiction, in the 9th section, to actions on contracts, judgments and decrees, seems to authorize the inference that the framers of the law considered that actions for torts were embraced by the terms of the first section. If they were not supposed to be within the first section, why were they expressly excepted in the ninth? Taking the facts stated in the praecipe and affidavit to be true, we think the plaintiff, within the meaning of the attachment act, is a creditor of the defendant, and this action, arising out of a contract, is not excluded by the proviso in the ninth section of the act. The motion is therefore overruled.

The defendant's attorneys put in a plea of non assumpsit, and elected to have the property attached remain in custody. The case was tried, and a verdict returned for the plaintiff for \$1,000.00. Caldwell sued out a writ of error to reverse the judgment rendered on that verdict, and assigned for error: 181

1st. That the court overruled his motion.

2d. That attachment will not lie for such a cause of action.

C. C. Carroll, for Plaintiff in Error.

Is the breach of a marriage contract a cause of action for which the writ of attachment may issue? By statute, if any creditor shall make oath that his debtor hath absconded, to the injury of his creditors; or that such debtor, etc.) Swan's Stat., 88). To authorize the writ of attachment therefore, there must be—

1. A creditor.

2. A debtor, and, by consequence.

3. A debt.

Does a breach of promise of marriage create a debt? Does the breaker of the promise become a debtor, and the promisee a creditor? A debt is a liquidated demand; a sum certain; a demand provable under the English bankrupt law; a demand for which special bail might be obtained under the Practice act of 1831, without an order of the court (29 O. S., 59, § 6); a demand which at common law, survives the person for the benefit or detriment of the estate; "credits" against which attachment may issue. The claim of damages for a breach of promise of marriage is not a sum certain—is not a debt. In an action for breach of promise of marriage, "The principal ground of damages is disappointed hopes; the injury complained of is violated faith, more resembling in substance, deceit and fraud, than a mere common breach of promise. The damages may be, and frequently are, vindictive," etc. (1 Pick. Rep., 79.)

At common law the action did not survive to the personal representative, *Chamberlain's Admr. v. Williamson*, 2 Maule & Selwyn, 409. Nor against the personal representative of the promisor, *Stubbins v. Palmer*, 1 Pick. Rep., 71. It did not survive because it is a *wrong* and not a *debt*. *Chamberlain's Admr. v. Williamson*.

When the cause of action appeared from the affidavit of the plaintiff to be the nonperformance by the defendant of the stipulations in a charter party made with the plaintiff, the owner of the ship, the defendant having refused and renounced the employment of the ship on the

voyage described in the contract, by which damages to a large amount were sustained, it was held that this was a case of damages *not susceptible of liquidation so as to sustain a foreign attachment*. 1 U. S. Dig. 38, § 473, reference, *Clark v. Wilson*, 1 Wash. C. C., 560.

162 The qualified liability of a member of a manufacturing corporation, for the debts of the corporation, under statute 1808c, 65, § 6, is not a debt that can be proved against the estate of an insolvent debtor, under statute 1838c, 163 (3 Met. Rep., 61.) By the statute 1808c, 65, § 6, it is provided that an execution issued against a manufacturing corporation, if not satisfied within fourteen days after demand made upon the president, treasurer or clerk of the corporation, may be levied on the body or estate of any member or members of such corporation (16 Mass. Rep., 391, 17 *ib.*, 64; 10 Pick. R., 372). Not provable as a debt under the English bankrupt law. (Eden on Bankrupt Law, 130, 131.)

The *attaching debt* must be such as a creditor can swear to, that can be designated in an advertisement. "That upon the return of said writ, the clerk who issued the same, shall make out an advertisement, stating the names of the parties, the time when, from what court, and *for what sum* the writ issued," etc. (Stat. 89, § 3.) In case of unliquidated damages, is there any *sum* for which a writ of attachment can issue? "And it shall be competent for such defendant, at or before the said third term, to file special bail," etc. (Stat., § 9.) In what sum, in case of unliquidated damages? Hence, it has been decided that a foreign attachment can issue only for a cause of action founded on a contract, and of such a nature as to enable the plaintiff as of course, to require special bail. (1 U. S. Dig., 26, § 131, 132, reference, *Jeffrey v. Wooley*, 5, Halst., 123.)

The command of the writ is "to attach the lands, tenements, goods, chattels, rights, credits, moneys and effects of said debtor." What are attachable credits? The *debt* for which an attachment issues ought to be *mutatis mutandis*, a credit which could be attached. Can you attach as a debt, a breach of promise of marriage? Such a proceeding would be novel at least.

Damages for the breach of an agreement, which in their nature are uncertain, cannot be made the subject of an attachment (1 U. S. Dig., Sup. 12, § 60, reference *Hugg v. Booth*, 2 Iredell, 282; *Deaver v. Keith*, 5 *ib.*, 374.

On the return of the *scire facias*, the garnishee may appear and "confess the amount of such debt" (stat., § 10). To how much shall the garnishee defendant in an action for breach of promise of marriage confess? In how much shall the garnishee "under oath," admit that he 163 is "indebted?" How much is "due" from him to the defendant in attachment? In what amount shall the garnishee be held to "special bail?" (See stat., § 59, 10.)

If the legislature had intended to make unliquidated damages attachable, it would have been so easy to have said it. The distinction between liquidated and unliquidated damages is well understood, and in very common use with law makers, as well as with law expounders. No one ever mistakes unliquidated damages for debt. Neither in law nor in common speech, is it ever said, he *owes* me so much for a trespass; \$100 are *due* me for a neglect; he is *indebted* to me \$1000 for unskillfully conducting my suit at law; among his other *debts*, is a breach of marriage contract, etc. These, and the like, as lingual improprieties, are, at once, obvious to all. So that, in sustaining this attachment, the court

will not only violate a well settled legal distinction, but the common sense and common usage of mankind.

But it is supposed that the following words in the statute have force to extend the meaning of the words, *debt*, *creditor* and *debtor*: "Provided that no judgment shall be rendered under the provisions of this act, except for causes arising out of, founded upon, or sounding in contract, or upon the judgment or decree of some court of law or chancery," etc. It is thought that the word *contract* in this proviso extends the remedy by attachment to all contracts. But it is clear that an unbroken contract for the performance of some act other than the payment of money is not attachable: a marriage contract for instance, before breach is not attachable; and clearly it is not the proper office of an exception to *enlarge* the operation of the act. The legitimate rendering of the statute is this; for debts an attachment may issue but for such debts only as sound in contract. A very useless exception perhaps, as all debts sound in contract, but such a one as the legislature might from over abundant caution, adopt. But certainly a construction more reasonable than that which makes the exception of force to change the whole language and purport of the enacting and affirmative part of the statute.

Now, by statute, actions for breach of promise of marriage survive to the personal representative, so do all torts; but that, I apprehend, does not make all torts debts, nor attachable: and as at common law, the breach of promise is in the nature of a tort, it remains so still and is not a debt.

As proceedings in attachment were unknown to the common law, it is necessary to pursue the statute strictly. Wright's Rep., 566. 154

M. Pennington and *D. Peck*, for defendant in error, relied upon the following points and authorities:

1. If the judgment had been obtained by default, there might have been two questions.

1. Was the affidavit sufficient?

2. Would attachment lie for such a cause of action?

But by pleading to the declaration, those questions were waived.

An appearance and plea to the merits of the action waived all objections to the form of the action, the question of jurisdiction of the person of the defendant, and the right of the parties to sue and be sued. (3 Alabama Rep., 43; 2 Pick., 33; 1 Pike 339; 10 O. R., 408; 8 O. R., Pt. 1, 179; 3 Ib., 224.

If the plaintiff in error wished to take the opinion of the supreme court on his motion, and the other matters growing out of it, he should have suffered judgment by default, and then prosecuted his writ of error. *Mitchell v. McCude*, 10 O. R., 408.

Will attachment lie for breach of promise to marry?

This is a cause of action sounding in contract. Section 9 stat., p. 91, provides "that no judgment shall be rendered under the provisions of this act, except for causes arising out of, founded upon, or sounding in contract." What do the words debtor and creditor, in the first section, mean? It must be conceded that they apply to something beyond that which might be founded upon, or sound in contract, or why was their meaning restricted to cases of that character? Debt, strictly speaking, means a liquidated claim for a sum of money, but it is the every day practice to sue in *assumpsit* as well as covenant in attachment, which may be for either unliquidated or liquidated damages. This is a debt due for a breach of contract, and it can be in no way different from a claim for

services, or for goods sold—it *sounds* in contract. (See *Hunt v. Norris*, 1 A. C. L., 566.)

The facts necessary to attach jurisdiction at the commencement of the suit, were these: "The indebtedness of the defendant—his nonresidence, and the actual levy of the attachment upon the property owned by him." 7 O. R., 257, 259.

HITCHCOCK, C. J., in delivering the opinion of the court, in substance remarked (after reverting to the facts of the case), that the main question raised by the plaintiff in error, was, whether an attachment would lie for a breach of promise to marry. The case is one arising upon a construction of our attachment law. Formerly the writ of attachment could be sued out in all cases, of tort as well as of contract, but the legislature has now confined it to cases "arising out of, founded upon, or sounding in contract," etc. A remedy is given by attachment under the present statute, in all cases where the form of the action, is contract, as contradistinguished from tort. In a breach of a promise of marriage, the form of the suit is for a breach of contract, and the writ of attachment is as plainly applicable to cases of this description, as to cases of debt for the nonpayment of money, or of damages for the breach of any other contract.

Judgment of the court below affirmed.

218

TAXING POWER OF TOWNSHIP.

OLIVER LOOMIS ET ALS. V. LAKE AND TRUMBULL COUNTY PLANK ROAD COMPANY AND OTHERS.

Before Hon. B. F. Wade, President Judge of the Third Judicial Circuit, at Chambers.

Taxing power—Voting for subscription to stock—Constitutionality—Injunction

At the session of 1848-9 the legislature incorporated the Lake and Trumbull County Plank Road company. By the act it is provided that the trustees of the township along the line may subscribe to the capital stock any sum not exceeding \$5,000. The ninth section provides that before any subscription by the trustees shall be made, the trustees shall give twenty days' notice by publication, etc., that at the next annual township meeting a vote will be taken "for subscription," or "against subscription," and whether for two, three or five thousand dollars; that the trustees shall provide a separate box therefor, and that the election shall be conducted as at elections for township officers, under the supervision of the judges thereof. The tenth section provides that in two days after the election, the trustees shall certify the balloting to the auditor of the county, and that if it shall appear that a majority of the ballots are in favor of a subscription, "then the trustees shall make such subscription, and for the sum having the largest number of votes."

Oliver Loomis and eighty-five other taxpayers of the township of Windsor, Ashtabula county, filed their bill in chancery, setting forth that the trustees of that township had subscribed \$5,000, on behalf of the township, to the capital stock of the Lake and Trumbull County Plank Road company, which the auditor of the county had levied upon the grand list of property in the township, and the treasurer was proceeding to collect. They charged that the tax was illegal and void, because, *First*, the act of incorporation of the company, in so far as it authorizes the trustees to subscribe for and bind the township, was unconstitutional; and *Secondly*, that the assent of the people of the township was never regularly obtained to make said subscription, inasmuch as no notice of the intention of taking the vote was given, nor was the voting conducted

as required by section 9 of the act; no separate list of the voters being kept, or separate box to receive the ballots. The company, the trustees of the township, the auditor and the treasurer, were made parties defendant, and a perpetual injunction prayed against the collection of the tax.

The company, by their president and secretary, answered the bill and supported their answer by affidavits, from which it appeared that the notice required by law was regularly given, that a "separate and convenient box" was provided, in which the ballots were deposited, and generally that the election was fairly conducted "under the supervision of the judges thereof," that the township contained about 200 electors, 194 of whom voted at the election for township officers, and 179 upon the question of subscription—of these 122 were in favor and 57 against it. But no separate list of the electors voting upon the question of subscription was kept, nor was an attempt to ascertain who had thus voted, made, except noting upon an informal paper the names of such electors as voted at the township election and did not vote upon the question of subscription. *Messrs. Giddings and Jones*, for the complainants, urged the application for the reasons set forth in the bill. They insisted that that portion of the charter of the company which authorized the trustees of townships to subscribe stock upon the vote of a majority of the electors, was opposed to section 4 of article 8, of the constitution of this state. That it took from the minority their property without their consent and without compensation, and also compelled them to become stockholders in a private corporation, and subject to all its burdens. They also insisted that the failure of the trustees to keep a list of the voters, with other irregularities in conducting the election, made the tax illegal and void. They cited *Burnet v. The Corporation of Cincinnati*, 3 O. R., 73, and *Culbertson v. The City of Cincinnati*, 16 O. R., 674.

Messrs. Wm. L. Perkins and R. P. Ranney, for the respondents, made the following points:

I. That the complainants having separate and distinct interest, could not join in the same bill.

II. That the bill upon its face was insufficient to warrant the injunction prayed for. It avers that the tax was levied under a void enactment, and is about to be made by levy upon personal property, without stating any circumstances of peculiar injury. This would be a mere trespass, for which an adequate remedy exists at law, and for which an injunction is never granted. To this point they cited *McCoy v. Corporation of Chillicothe*, 3 O. R., 368.

III. The law is constitutional. Confusion frequently arises from not well considering the difference between state and national legislation. The latter is invalid, unless the power to enact it is found expressly granted, while the former is valid unless expressly prohibited. This law falls under the taxing power of the legislature, and is designed to aid the public improvement of a section of the state by local taxation, with the consent of a majority of the people; and is not to be distinguished in principle from the imposition of taxes for the support of schools, etc., authorized by a vote of the people in the same manner. The power of the legislature to impose taxes for public purposes, is entirely unlimited by the constitution. The only check is found in the responsibility of the legislators to the people, and frequent elections. Hundreds of thousands of dollars have been subscribed by the counties, cities, and towns of the state, under laws like this, or differing only in the circumstance that in this, the taxpayer has a right, but is not compelled to re-

ceive stock for the tax he pays. This long course of legislation should not be overthrown, unless its repugnance to the constitution is made clear. They cited upon this point, *Thomas v. Leland*, 24 Wend. R., 65; *Harrison v. Holland*, 3 Gratt., 257; *Burgess v. Pue*, 2 Gill, 14; and *Young v. Buckingham*, 5 O. R., 485.

IV. The assent of the people was legally obtained. The averments of the bill, that notice was not given, and a separate ballot box provided, are positively denied by the answer and disproved by the affidavits. It was not necessary to keep a separate poll book; but if the law did require it to be done, it was still only directory, and a failure to do it would not invalidate the tax. No technical objections should be listened to. In fact the only questions to be considered were, were all legally notified to vote, and did a majority, without fraud or unfairness, give their assent to the subscription? If so, the moment the ballots were deposited, the right of the company to the subscription attached, and no failure of the officers to do their duty could impair that right.

The Judge, in deciding the case, remarked that the case was one of much importance to the company and the public. He held that the complainants might all legally join in one bill. That their position was not to be distinguished from that of several parishioners joined in a bill to establish a *modus*, and like cases to be found in the books.

In respect to the second point made by the defendant's counsel, he remarked, that the view he had taken of the case rendered it unnecessary to decide it; that although the supreme court, in the cases cited, seemed to make a distinction between making the tax by a sale of real and personal property, he still doubted whether the distinction was a sound one. The next question itself was, was the law constitutional? Every law is presumed to be in the first instance, and should be approached with deference by the judiciary; still, if it could not be reconciled with the constitution, their duty was plain, and he should not hesitate to declare it void. He had always been opposed to such legislation, regarding it as unjust and oppressive, and when in the legislature had uniformly voted against it; but his duty then and now were very different. With its *policy* he had now nothing to do, and he could find no constitutional provision that it violated. A broad and almost unlimited discretion was vested in the legislature, in the imposition of taxes. This was but an exercise of that power, and exercised in a familiar manner, and upon as liberal principles as could well be adopted.

In regard to the regularity of the election, he remarked that he was perfectly satisfied that legal notice that the vote would be taken had been given, and that a large majority of the electors had voted in favor of the subscription. Had he found the notice wanting, or any unfairness in obtaining the vote, he should not hesitate to enjoin the tax. In his opinion the law required the trustees to keep a separate list of the voters. But would it annul the effect of the vote if they omitted it? In his opinion it would not. He was required to look through forms to the substance. If the electors were notified to vote, and a majority did vote for subscription, the company had a right to demand that it should be made, and no omission of the officers to furnish the proper evidence could deprive them of it. It was true that the right to impose taxes, was a matter of strict law, and in looking for the power, the court would institute a rigid scrutiny; but when the power was found, the proceedings of the officers should be regarded with indulgence. On the whole, he could see no cause for granting the injunction, and it must be refused.

CONFESSION OF JUDGMENT.

221

[Supreme Court of Franklin County, Ohio, December Term, 1849.]

Before Judges Hitchcock and Spalding.

[ANONYMOUS.]

Jurisdiction of supreme court.

On the application of an attorney to take judgment by confession, it was held that this court had no original jurisdiction to entertain such a suit; and that the original jurisdiction of this court, in cases at law, was taken away by the act passed March 12, 1845. (See vol. 43, p. 81, sec. 9, Swan's Stat., 222, sec. 2.)

HITCHCOCK, J., said that the court lately had this question before them, in another county, in an action of ejectment, and had dismissed the case for want of jurisdiction.

INNKEEPER

234

[Supreme Court of Ohio, Medina County, September Term, 1849.]

GAST V. GOODING.

[This was a writ of error to the common pleas of Medina county. It was adjourned for decision to Wayne county, where all the judges of the supreme court happened to meet, and all concurred in the decision. The report is furnished by Wm. Turner, Esq., at the request of Judge SPALDING, as he informs us. Ed.]

Liability of innkeepers.

The facts are these: Gooding, the plaintiff in the court below, brought an action of assumpsit against Gast, charging (in substance) that the latter while an innkeeper in that county, received Gooding into his inn as a guest—that when about to retire to his lodging-room for the night, the plaintiff handed to the landlord his pocket-book containing about seventy-four dollars for safe custody—that Gast received it, but never returned it to Gooding when called for—and that the pocket-book and its contents were taken and carried away by some person unknown to the guest, and during his stay at the inn.

The ground of defense was, that the landlord's house was broken into in the night, and that the pocket-book, a trunk of jewelry, and other articles, were stolen by burglars then and still undiscovered. Evidence to that effect having been offered and admitted by the court, the counsel for the defendant then requested the court to charge the jury, that should they find that a *burglary* had been committed by persons from *without the inn*, and not by the defendant, or his domestics, or guests, and without the knowledge, consent, or default of any of them, then the plaintiff could not recover, which request the court refused to grant—but **235** charged, that if they should find that such burglary and theft had been perpetrated in the night as above stated, still it would not exonerate the defendant from liability—and further charged, that nothing would thus discharge him but the act of God, the acts of public enemies, forcible robbery, or the acts of an armed mob.

The jury having returned a verdict for the plaintiff, the defendant excepted to the charge, and sued out his writ of error.

The propositions above stated as constituting the charge of the court, were assigned as errors—and the cause having been argued in the county of Medina, it was adjourned to the county of Wayne for decision, when, all the judges of the supreme court being present and concurring, it was adjudged, that the charge to the jury in the court below was *correct*, and that the judgment of the common pleas be affirmed.

NOTE—It hence appears that the courts of Ohio sanction and adopt the doctrine of the courts of Massachusetts, as found in the 9th vol. of Pickering's Repts., pp. 280-'4, and hold the innkeeper to be an *insurer* of the property of his guests.

235

PLEADING.

[Commercial Court of Cincinnati, January Term, 1850.]

STOLLEY V. BROOKS AND MORRIS.

Pleading—Notice with general issue—Special pleas.

Held, That a defendant cannot both plead special matter, and give notice of it with the general issue, although the special matter in the plea and notice be not the same; and in such case the court, on motion by plaintiff, will order the special pleas to be stricken out.

Storer & Gwynne, and *Walker & Kebler*, for Plaintiff.

Coffin & Mitchell, for Defendants.

This was an action of covenant. There were five counts in the declaration, and several breaches assigned. The defendants pleaded *non est factum*, and eight special pleas, and then appended a notice of special matter, some of which was the same as that set forth in the special pleas, and other not. There were also demurrers to some of the counts, and to some of the pleas. The plaintiff moved to strike out all the special pleas, because of the notice, or else that defendant should elect. The court, Judge Key, sustained the motion to strike out.

251

EMINENT DOMAIN.

[Superior Court of Cincinnati, October Term, 1849.]

THE PROPRIETORS OF THE CEMETERY OF SPRING GROVE V. THE CINCINNATI, HAMILTON, AND DAYTON RAILROAD COMPANY.

Appropriation of private property to public uses—Injunction against a trespass, when allowed—Eminent domain—No power in the state to grant it to any corporation, so that it cannot be resumed.

This was an application for an injunction. The facts sufficiently appear in the opinion of the court.

Messrs. F. Ball, C. D. Coffin and W. Y. Gholson, for complainants, made the following points:

I. The proceedings in the commercial court, on appeal by complainants, are no bar to this application, because they are irregular, and railroad

charters are to be construed very strictly. (7 Scott's New Rep., 835; 1 Baldwin, 232; 1 Kelley's Georgia Rep., 524; 17 Ohio, 353.)

II. A court of chancery will always interfere to prevent irreparable injury even by a trespass; and it is no answer to say, that we still have more land than we need; nor that we do not intend to use this for interment; nor that we have obtained power to sell it, and have been negotiating to that end. (Eden on Inj., 140; 2 Story's Eq., sec. 422, 428; 7 Ves., 308; 1 Baldwin, 232; 9 Paige, 323; 4 Mylne & Craig, 120, 18 Eng. Ch. R.; 6 Paige, 88.)

III. The 6th section of the cemetery charter expressly exempts this property from appropriation to public uses. This exemption the legislature had power to make, and it has not been revoked by the amendment authorizing a sale. The decisions sustaining exemptions from taxation are analogous, and in principle not distinguishable. (7 Cranch, 164; 3 How., S. C. U. S., 133; 6 Ia., 507, Opinion of Woodbury, J.) But admitting a want of power on the part of the legislature to grant a general exemption, applicable on all occasions, as well to the state as to those claiming a privilege under the state, it was clearly competent to limit existing powers of appropriation held under the control of the legislature, and *general* delegations of the same power which might be afterwards granted. Courts do not pronounce a law unconstitutional in the abstract, but in reference to the case before them. And if on any fair hypothesis the law may constitutionally govern the case, the law will be sustained. To declare it unconstitutional is the last resort. On these principles, the exemption may be held good as to the present case.

IV. This provision of the cemetery charter is a contract, which is impaired by the railroad charter. (Smedes & Mar., 12; Angell & Ames, 503; 16 Ohio, 599.)

V. The 9th section of the general railroad act is unconstitutional, because it does not provide for a compensation in money. It does not require prepayment, and it allows benefits to be estimated. (9 Dana, 114; 3 How. Miss. Rep., 240; 26 Wendell, 493.)

Messrs. T. Walker, C. Anderson, C. Fox and A. Taft, appeared for respondents, and made the following points:

I. This court has no jurisdiction. The only question is the amount of compensation, and proceedings to determine this are now pending in the commercial court. There is only a general allegation of irreparable injury, without specifying in what it will consist; and upon such an allegation the court will not interpose. But if the allegation were sufficient, the facts set up in the answer contradict it, by showing that the question is purely one of dollars and cents. This ground was never meant to be used for interment, and is not suitable for it. The complainants have obtained leave to sell it, and have been negotiating to sell it to respondents. There is no other convenient access by this railroad to the city. To go round the cemetery would increase the cost \$180,000. And to say that the repose of the dead would be disturbed, is mere sound without meaning. There is no pretence that respondents are not able to pay whatever may be adjudged against them, or that they are wantonly abusing their power.

II. The exemption in the cemetery charter is null and void. It is in these words:

"This corporation is authorized to purchase, or take by gift, or demise, and hold land exempt from execution, and from any appropriation,

283 *to public purposes, for the sole purpose of a cemetery, not exceeding three hundred acres, one hundred and sixty-seven acres of which, such as shall be designated by the directors, shall be exempt from taxation," etc.*

This then is an attempt on the part of the legislature to grant away irrevocably the eminent domain of the state, so far as this property is concerned. This cannot be done from the very nature of sovereignty; for if it could be done in one case, it might be done in all, and so no eminent domain be left in the state. But if there be any doubt upon general principles, the explicit language of the constitution of Ohio removes it altogether. The 4th section of the 8th article is in these words:

"Private property ought and shall ever be held inviolate, but ALWAYS subservient to the public welfare, provided a compensation in money be made to the owner."

Now, 1. This is a private corporation. Its franchise is private, and its property is private. (Angell and Ames, 23; 2 Kent's Com., 275.) 2. The use for a railroad is public use. (3 Paige, 45; 18 Wendell, 9; 8 Dana, 289.) And the company are empowered to take any property. The words are these, see 9th section: By this general act, the corporation "*is authorized to enter upon any land for the purpose of examining and surveying, and surveying its railroad line, and may appropriate so much thereof as may be deemed necessary for its railroad," etc.* The manner of appropriation is fully pointed out, and the company have strictly pursued it.

Therefore, the appropriation is valid in spite of the exemption. (11 Peters, 420; 6 Howard, 507; 7 Cranch, 164; 4 Peters, 561; 7 New Hamp. R., 69; 11 Peters, 641; 5 Cowen, 538; 10 Ohio, 235.) And it is no answer to say that the exemption was a matter of contract, because, if it were, the legislature had no power to make such a contract.

III. But if the legislature could part with the eminent domain, it has not done so by any fair construction of the cemetery charter. The words of the exemption are, "*for the sole purpose of a cemetery;*" and this land was never intended to be used for that purpose.

IV. And lastly, if the grant was ever made, it has been revoked as to this land, at the instance of complainants. The act of March 21, 1849, amending the cemetery charter, and authorizing a sale of this ground, revokes the exemption as to this ground. This act empowers the corporation "to sell on such terms, for such purposes, and in such quantities, as they shall deem proper, all that portion of the low grounds," etc., [describing what includes the property condemned.] Also "to sell all the 284 lands belonging to them, lying south of the Hamilton road." This takes away all the sacredness attached to this land; for no one will pretend that this exemption would exist, after a sale. Yet it would pass with the property, if it exists now.

OPINION OF THE COURT, PER JOHNSTON, J.

The first ground on which the argument places this application is, that the defendants are mere trespassers, entering or threatening to enter upon the premises of the complainants, without any authority of law. It is not denied, that the legislature have clothed them with full power to enter and take the land. Nor is it denied that they have taken all the preliminary steps required by the act of incorporation, in order to appropriate the land; but it is claimed that the judge who appoints the

board of appraisers, in issuing his warrant, committed an error, and all subsequent acts in the premises are void; and that by opening the door with the wrong key, they are trespassers. This is strictly technical, and in strictness of technicality ought to be noticed, because the point is neither made nor alluded to in the record. Indeed, the proceedings are tacitly, if not expressly admitted to be regular, and it is predicated on the idea, true or false, that the complainants hold the land by a right of *pre-eminent* domain: all appropriations to public uses. But as both parties desire the case to be decided upon its merits, all the points both inside and outside the pleadings, I proceed.

By the defendants' charter, the warrant is to be issued in term time, or by the judge of such court in vacation. The warrant in this case was issued on the 16th day of July, 1849, by the commercial court of Cincinnati, in term time, to George P. Taft and John H. Dubbs, directing them on the 24th day of July, 1849, or as soon thereafter as practicable, to make the appraisal. Thus far it is admitted that the proceedings are right. But on the 24th day of July, 1849, this entry is made on the back of the warrant: "John H. Dubbs declining to act, John Snyder is appointed appraiser in his stead. (Signed) Thomas M. Key." Whether the amendment was made by Judge Key, the sole judge of the court in term time, or by the clerk, does not appear from the record. On the 25th day of July, George P. Taft, John H. Dubbs, and John Snyder, took the oath required by law, and made the appraisement accordingly. After, as well as before, the endorsement of the warrant, the proceedings are all regular. The question is, whether, when Dubbs refused to act, the court should have been recalled, and a new one issued, or whether it was sufficient to amend the old one, as was done in this case. Most probably the act was done in term time, there was no occasion for a new warrant, it would have been competent for the judge to draw his name out of that of Dubbs, and insert that of Snyder, and to all intents and purposes the judge did this very thing, or its equivalent. But if the amendment had been done in vacation, what then? That the party might be at a loss for some one to issue the warrant, the act provides that the court in term time, or the judge in vacation, may do it. Now suppose that in term time the court issued the warrant, and in vacation a vacancy occurs in the board by death or resignation. What is to be done? An application cannot be made to any other court, which may be in session, because the proceedings are in the files of the first court. The work must be suspended, or the proceedings must be done. Either the old warrant must be amended by filling the vacancy, or a new one issued. Before a new one can be issued, the old one must be revoked—and by what right shall a judge in vacation revoke a warrant issued in term time by a court? The meaning of this is obvious, and is this. The parties shall never be without a warrant in any emergency; and what the court in term time may do, the judge in vacation do. He may revoke the old warrant and issue a new one, or he may amend the old one by filling the vacancy. This may be done in strict compliance with the law, and without the rights of any one.

But it is said that the complainants had no notice of this amendment. That they had notice that Dubbs would appraise their property

that Snyder would. It is not denied that they had notice, under the statute, of the pendency of the proceeding to take their property; nor that this notice was irregular or defective. This is all the notice the statute requires, and allowing the whole proceeding to be in its nature judicial, this notice was sufficient to bring them into court for all purposes connected with the assessment of these damages. The notice of the time at which the appraisers should meet, is not required by law, and therefore is an act of supererogation.

286 But is not this undertaking collaterally to try whether Judge Key has done his duty well? At first look it seems so, but on reflection it all resolves itself into the question of jurisdiction, lying beyond this point. The complainants say the defendants are mere trespassers, acting without authority of law, not having taken the preliminary steps necessary to clothe themselves with that authority. Now, they have a right to go into some tribunal to enquire whether these steps have been taken. Into what one must they go? That where these steps are alleged to have been taken, or some other? That entering on one's premises as a mere trespasser, without authority of law, for the purpose of doing permanent and irreparable mischief, gives chancery jurisdiction and makes a proper case for an injunction, is well enough settled. Whatever court may have the power to grant or refuse such injunction, may also enquire whether the party complained against is acting with or without authority of law—whether he has regularly prosecuted the necessary proceedings in a court of competent jurisdiction, in order to bring himself within the provisions of the law, and whether that court has passed upon the subject matter of his suit. But the judicial acts of such court cannot be reviewed in this manner. And although I have expressed an approval of what was done by Judge Key in this matter, I distinctly disavow all right to pass upon his judicial acts.

But it is said that the same questions are pending before Judge Key, now raised by this bill; and that in a conflict of jurisdiction, the last tribunal is ousted. I do not think the questions are the same, nor do I think there is any conflict of jurisdiction. The question before the commercial court is simply whether the compensation allowed by the appraisers is adequate to the damage done, or to be done by the defendants. The questions before this court are, whether they have any right to take the property at all, and whether they ought not to be enjoined from taking it.

I supposed at first that there might be a question of judicial comity in the case. But as I am called on, neither to try the same questions now before Judge Key, nor to enjoin any of his proceedings at law, I see no objection to taking jurisdiction of the case. I have already held that there was authority in the charter of the railroad company to take this land, and that the defendants, so far as I had a right to judge of the matter, had brought themselves within the requirements of the charter, so that they are not mere trespassers, without authority of law, whatever other reason may exist for enjoining them.

287 This brings us to the leading question made by the complainants, whether they do not hold this tract of land by charter in the nature of a contract, exempt from all appropriations to the public use. And this leads to an examination of that great question of eminent domain.

Wherever there is sovereignty, whether in the old world, where it is held in trust for the people by things called kings, or in this country

where the people wear it upon their own shoulders, two great and fundamental rights exist. The right of eminent domain in all the people, and the right of private property in each. These great rights exist over and above, and independent of all human conventions, written or unwritten.

In most of the written constitutions of our country, they are recognized as rights *already* existing. In the constitution of Ohio, they are re-enacted, and placed side by side in the "Bill of Rights," as if never to be separated. "Private property *ought* and *shall* ever be held inviolate, but always *subservient* to the public welfare, provided a compensation in money be made to the owner." What stronger expression can be given of this right of eminent domain? Private property, though held inviolate as between man and man, shall always, not only serve, but *subserve*, the public welfare, when the public exigencies demand it. What the public welfare requires, is often a matter of doubt and controversy among men equally wise in questions of state. But these questions once settled by the proper tribunal, I know of no limit to the right of eminent domain. In practice these matters should always be cautiously considered with reference to the wants of the public, as being of greater or less importance, to the nature of the property to be taken, as being of greater or less value. But when decided in the right forum, that the public welfare outweighs the private inconvenience, I know of no article of property so sacred, no rood of ground so holy, that it may not be swept away by the right of eminent domain, "provided a compensation in money be made to the owner." And that this compensation should always be made in advance, though very desirable, is not always possible.

If our city was attacked by a public enemy, I do not doubt that the public, by this right, might level down your schools and colleges for batteries; garrison your cathedrals and churches with troops; stable their horses in your warehouses; and bivouac their armies in your parlors; seize every barrel of meat, and every yard of cloth; and if need be, in the last resort, burn the city to ashes; making the owners of the property a compensation in money, either before or after the property was taken. 258

It will be said "this is an extreme case," and so I intend it, a case in the highest extreme. Let us take a case in the opposite extreme. Let us suppose that a single peasant is engaged in cultivating turnips and cabbages, in some secluded spot, shut out from all the public highways, so that without trespassing on others he cannot get his produce to market. I do not doubt that by the same right, the public authorities could open this man a road though it should pass over the ground, and through the improvements of the best men in community; and a compensation in money is all the the owner of the property could require.

Between these extremes there are many shades of distinction, Not as to what is lawful, but as to what is expedient. The proportion the public welfare to be *subservied*, bears to the private inconvenience of exchanging property for money against one's will, and at the appraisement of others, is always to be considered; and that which the high power of eminent domain enables the public to do, should be done wisely, reasonably, and decently. Thus the public exigency that would exhume the remains of a venerable citizen, whose friends and relations were living around him, should be higher than that which would plough up the

grave of an Indian chief, whose tribe was extinct and whose name forgotten. The exigency that would root up the fruit trees and shrubbery about a man's dwelling, should be greater than that which would open a way through his corn fields or meadows. And the exigency that would open a railway through even the ornamental grounds of a cemetery, ought to be more important than that which would open it through a race course or bowling green, which had cost more money, and would be harder to replace. But these are questions of degree, and not of right. The right of eminent domain is co-extensive with the public wants, and has no other limit. The right of the property holder is a compensation in money, and has no other extent.

But it is said that the legislature, representing the sovereignty of the state, may part with this right of eminent domain, and that they have, in the case under consideration, parted with it in this piece of ground. In the 6th section of the charter, "This corporation is authorized to purchase or take by gift or devise, and hold land exempt from execution, *and from any appropriation to public purposes*, for the sole purpose of a cemetery, not exceeding **259** three hundred acres," etc. Can the legislature do this? If they can do it in one instance they can do it in another, and reason and justice require that they should be impartial. It is not extravagant to suppose, that including religious congregations, benevolent societies, common schools, academies, colleges, etc., there are not less than one thousand institutions in Ohio equally meritorious with this, all of them needing land. Now, if the legislature, may exempt this three hundred acres from the right of eminent domain, they may exempt three hundred acres in favor of each of these other institutions, and we shall have the singular case of three hundred thousand acres of land, placed beyond the reach of the public for any purpose whatever. It is not necessary nor proper to press this view further than to say, that the power to exempt three hundred acres, implies the power to exempt three hundred thousand acres, and every acre in the state. This great attribute of sovereignty resides in the whole people, independent of all constitutions; not in the people that are here to-day and to-morrow; not in the people that shall be here a hundred years hence; but in the people which, at any period, shall occupy the channel of time, down to its latest lapse; and the people of to-day cannot alienate it from the people that shall come after. If all the population of Ohio should assemble to-day, and under their hands and seals, solemnly give, grant, and convey this great popular right over a part or all of the private property in the state, the rising generation would laugh it to scorn, as if it were an attempt on the part of their fathers, to alienate from them the light, the air, or the running water, or to abridge their rights of self defence and locomotion. And if the people could not do this act themselves, *a fortiori*, their representatives cannot do it for them. But admitting that the people do possess this power of alienation, it is not among the delegated powers of the legislature, and is one of the reserved powers. It is not only not among the powers delegated by the constitution, but is among the powers expressly inhibited. Private property, though held inviolate, shall nevertheless "be always," not to-day and to-morrow only, but at all times, "*subservient* to the public welfare." The 4th section of the bill of rights, and the first clause of the 6th section of the "act to incorporate the proprietors of the cemetery of Spring Grove," cannot stand together. Lending this power to a corporation for public uses, is not granting it away. If Zachary Taylor, as

commander-in-chief of the armies of the United States, through his subordinate agents, should order a common pioneer, to dig down my dwelling, to make room on the terrace where it stands, for a park of artillery, I fancy it would hardly vest the right of eminent domain over this spot of ground in the pioneer. No more does the exercise of this power, by a corporation for a public, much less for a private use, divest it out of the people. My hired man controls within certain limits, my horses. In my employ he rides, drives, ploughs, or wagons all day long. But it would be a foolish usurpation of power, if at night he should sell my horses. In the morning, I could pursue the purchaser with a writ of replevin, and recover my property; and the law says, that, as between the holder of the property, and the owner, there is no difference between a breach of trust and a felony—so too within constitutional limits, the legislature controls this right of eminent domain; but if they undertake to bargain it away, it is a fruitless usurpation of power, and the people may reclaim it when they will; and as between them and the corporation claiming it, there is no difference between a breach of trust and felony.

The power to tax, it is said, has sometime been granted away, and this is the better part of eminent domain. For reasons wise, or otherwise, this power has often been suspended, but never granted away, unless upon the payment of a gross sum, equivalent to the annually accruing taxes. And even this doctrine could not stand for an hour, if it was not supported by the great name of Judge Marshall, before the splendor of whose mighty mind, all the lesser lights of the judiciary fade into dimness. But suppose the right to tax has in some instances been bargained away, this right is different from the right of eminent domain. Taxing for the support of government, and taking for the public good, are not analogous. Before the Revolutionary war, the British crown claimed, by right of eminent domain, the power to tax the American colonies. This claim shocked the wisest statesmen of England, from the Earl of Chatham down, who had always regarded taxes in the nature of voluntary gifts from the people to the crown, and held that representation was indispensable to taxation. For how, said they, "Can the people of the colonies tax themselves in parliament, without a representative?" This was the principle on which the Revolutionary war was fought and won. The colonies never questioned the right of eminent domain, the power to take private property for forts, arsenals, encampments, naval armaments, and the like, in time of war, or for public highways in time of peace when the public good required it; but they insisted that taxation was the gift of the people, and that it could not be levied without their consent, expressed by their representatives on the floor of Parliament. This is now a part of the British constitution. In our country, where both branches of the legislature are popular, a bill for taxation is introduced in either; but in England, where the commons only are elected by the people, to this hour a tax bill can be introduced only in the house of commons. But it is said that acts of incorporation, as to private corporations, are in the nature of contracts, and that they are irrepealable. So the law has been held, and rightly too, upon the double ground that they pay the state in some way, real or imaginary, for the franchise, and that they have rights vested in the faith of these charters. But what has this to do with the right of eminent domain? The charter cannot be repealed, for the same reason that the title of a citizen to his real estate cannot be annulled, because both are contracts. But neither the franchise nor the property of a corporation, is more

sacred than the real estate of the citizen. They are all private property, and all "*subservient* to the public welfare." Take a bank, for example. Does anyone doubt that, in case the public good required it in time of war, the state may seize upon the last dollar in a bank, turn the safes and vaults into powder magazines, and the banking house into a fort, and putting muskets into the hands of president, cashier, directors, tellers, and clerk, make both the property and the men *subserve* the public welfare? or that in time of peace, if the banking house stood in the way of a public improvement of sufficient importance to warrant it, the state **could** pull down the house, and plough up its foundations, by right of eminent domain?—and all that the owners could require in either case would be, the compensation in money, secured by the constitution. All this neither repeals a charter, nor impairs the validity of a contract. It only makes private property subservient to the public welfare.

What is for the public welfare is a political question. That roads, canals, and railways are for the public welfare, has been decided by so many acts of the legislature, that the question seems to be hardly open at this day. Whether it would be wiser to make these improvements by direct taxation on the people, and by direct condemnation of the property necessary to be taken, I do not undertake to say. But the people have preferred a different mode. That of enlisting the enterprise and **262** capital of private corporations in the work, and clothing these corporations with the power to take private property for the public welfare, by paying a compensation for it in money. That railways are public uses within the meaning of the constitution, is now too well decided, to be questioned by an inferior court. The "Cincinnati, Hamilton and Dayton railroad company," is within the scope of these decisions.

But let us inquire into the character of the complainants, "The proprietors of the cemetery of Spring Grove." They are in the strictest sense, a private corporation. Established for the purpose of locating, improving, ornamenting, and regulating a select burying ground, in the modern style of monumental architecture, and landscape gardening combined; having no pretence to public utility, beyond the moral influence which scenes of mournful beauty may inspire in the bosoms of the visitors. The property of this corporation is held as inviolate as that of any individual citizen, and no more so, and is as subservient to the public welfare, and no less so.

There is no immunity in the 6th section of the charter, which, consistently with the 4th section of the bill of rights, can place this property on better footing than the property of a private citizen.

Allowing the powers of the railroad charter, for the appropriation of this property, to be ample—allowing that the company have taken the preliminary steps necessary to make those powers available, allowing that the grounds of the cemetery are private property, and that they possess no immunity from appropriation to the public use, there is yet another ground of equity relied on. That the railroad company are abusing their powers; that they are exercising them regardless of the rights of the living or the repose of the dead. This point challenges serious consideration, and raises that mixed and multifarious question already hinted at; whether in this case, considering all the circumstances, the end justifies the means. How great is the public exigency which demands this railroad? How much better will it be passing through these grounds, than if it passed by a curve on the outside? How much more will it cost the company in money, and the traveling public in time to

make this curve? What is the nature of the property to be saved by the injunction, or destroyed by the railway? Is it of such peculiar value that money cannot compensate its loss? Will the taking of this part of the ground work irreparable injury to the residue? Will the appropriation of this strip of land disturb the repose of the dead, or only abridge the pride of the living? 263

The general importance of this railway to the prosperity of Cincinnati, Hamilton, and Dayton, and all the rich agricultural country lying between, and near those points, as well as to the traveling public at large, cannot be controverted. To this we may add what is stated in the answer, that to go round these cemetery grounds would make a bad curve in the track, and increase the cost of the work \$180,000. These reasons make it both natural and proper, that the better, straighter, and cheaper route, should, if possible, be chosen. The ground to be damaged by this selection is a tract of land two hundred and sixteen acres, somewhat in the shape of the keystone of an arch, the narrow end resting on Millcreek, and the broad end extending northwardly over high, beautiful, and rolling lands. Nearly one-third of the tract next the creek, is low, flat, bottom land, part of it subject to inundation in very high water. Part of the upland, together with the trees, knolls, and natural terraces, between the high and the low lands, are sold out and occupied for burial purposes. The low lands at present, form an extensive meadow, with but little improvement except the outer fence and hedge, and a few young forest trees, the porter's lodge, and the main avenue. In this plain there are no bodies buried, and no lots set apart for that purpose, and from the abundance of better ground, it is not likely that any one would ever bury their dead in such a place. Still it is highly ornamental to the part actually occupied as a cemetery, by contrast with its roughness, and by giving distance to the vista.

Through this low ground the contemplated route of the railway passes, shortening the grounds at the front by 657 feet on the eastern, and 700 feet on the western line, and separating about one-third of the low ground from the main body of the land, and running some 800 feet south of the most southerly spot occupied for burial purposes, or so far as appears from the papers in the case, ever intended to be so occupied. Passing through what was probably intended, at some future day, to be ornamental grounds to the cemetery.

Is this a case of wanton outrage under color of law? Is it a case of irreparable mischief? Is there anything so peculiar in the value, character, or sanctity of this piece of land, that a board of appraisers, or a jury of a county cannot assess the damages?

If there is any truth in the answer, the railroad company have taken great pains, and incurred great expense to find a route that would avoid these grounds, so that no motive of wantonness can be ascribed to them, nor any disposition to use their chartered powers, without due respect to the rights and feelings of others. Nor do I see anything in the peculiar character of the property threatened to be taken, to require the extraordinary powers of equity. 264

Frequent reference has been made in the argument to an act passed April 3, 1849, authorizing the stockholders of this cemetery to sell the ground lying between the proposed rail track and the Hamilton road, and also all the land lying south of the Hamilton road, as removing any prohibition that might have existed in the charter against the use of this ground for public purposes. In my judgment there never existed any

valid prohibition against the condemnation and appropriation by law of this ground; but the charter did prohibit the corporators from selling it, or holding it for any other purpose than that of a cemetery; and this stood in the way of any amicable adjustment of the matter. To remove this obstacle and allow an amicable adjustment, this act was passed, and so far it is a beneficial act. But the parties have not made an amicable adjustment under the act, and it is now of no sort of importance, except as it goes to show that the plaintiffs were once willing to sell, if they could obtain what they considered a fair price. And this entirely dissipates what may be called the moral sensibility of the case. Because, desecrating the resting place of one's friends upon contract, is a cool thing, and disturbing the repose of the dead for money, is so business like, as to extinguish the sense of honor expressed in the bill. The upshot of the matter about this amendatory act, was this. The offers of the railroad were considered penurious, the demands of the cemetery were considered exorbitant, the assessment of the commissioners was considered unreasonably low—and here we are.

It is possible that originally there were some questions of high moral principle involved in this controversy. But before it came here, it had degenerated into a mere question of money, and questions of that sort are peculiarly adapted to a jury.

The injunction is refused.

265

APPROPRIATION OF PROPERTY.

[Railroad decisions—Points decided in the Commercial Court of Cincinnati.]

IN THE CASES OF THE CINCINNATI, HAMILTON AND DAYTON RAILROAD
COMPANY V. SUNDRY PERSONS.

At the October and January terms of said court, 1849—'50, by Thomas M. Key,
sole Judge.

[It having been found impracticable to procure full reports of these important cases, the editor has thought it expedient to group them together, stating merely the points made, the authorities cited, and the ruling of the court, from notes taken by him at the time.

In all the cases, Messrs. WALKER, FOX, TAFT and ANDERSON, appeared for the Railroad Company; and in the different cases, Messrs. GHOLSON, COFFIN, BALL, STOREE, GWYNNE, RIDDLE, and FERGUSON, appeared upon the other side. The arguments were very elaborate, and occupied many days.

The Cincinnati, Hamilton and Dayton Railroad Company was first incorporated by the act of March 2, 1846. (44 L. L., 280.) This act was amended by the act of February 8, 1847 (45 L. L., 81). It was again amended by the act of March 15, 1849 (47 L. L., 173), which authorized the company to adopt the general railroad law of February 11, 1848 (46 Ohio L., 40), as part of its charter, which was done. All the questions here presented arose under the 9th section of this general railroad law, which is in the following words:

"SEC. 9. Such corporation is authorized to enter upon any land for the purpose of examining and surveying its railroad line, and may appropriate so much thereof as may be deemed necessary for its railroad, including necessary side tracks, depots, workshops, and water stations, materials for construction, except timber, a right of way over adjacent lands, sufficient to enable such company to construct and repair its road, and a

right to conduct water by aqueducts, and the right of making proper drains. The corporation shall, forthwith, deposit with the clerk of the court of common pleas, or other court of record of the county where the land lies, a description of the rights and interests intended to be appropriated, and such land, rights, and interests, shall belong to said company to use for the purpose specified, on making payment or giving security, as is hereafter provided. The corporation may, by its directors, purchase any such lands, materials, right of way, or interest, of the owners of such land; or, in case the same is owned by a person insane or an infant, at a price to be agreed upon by the regularly constituted guardian or parent of such insane person or infant, if the same shall be approved by the court in which the description aforesaid shall be filed; and on such agreement and approval, the owner, guardian or parent, as the case may be, shall convey the said premises, so purchased in fee **266** simple or otherwise, as the parties may agree, to such railroad company, and the deed, when made, shall be deemed valid in law. If the corporation shall not agree with the owner of the land, or with his guardian, if the owner is incapable of contracting, touching the damages sustained by such appropriation, such corporation shall deliver to such owner or guardian, it within the county, a copy of such instrument of appropriation. If the owner or his guardian, in case such owner is incapable of contracting, be unknown, or do not reside within the county, such corporation shall publish in some newspaper of general circulation in the county, for the term of three weeks, an advertisement reciting the substance of such instrument of appropriation; upon filing such act of appropriation, and delivery of such copy, or making such publication, the court of common pleas or other court of record of the county where the land lies, or any judge thereof in vacation, upon application of either party, shall appoint, by warrant, three disinterested freeholders of such county, to appraise the damages which the owner of the land may sustain by such appropriation; such appraisers shall be duly sworn, they shall consider the benefit as well as injury which such owner shall sustain by reason of such railroad, and shall, forthwith, return their assessment of damages to the clerk of said court, setting forth the value of the property taken, or damage done to property; the amount of benefit conferred, and the difference between the value of, or damage done to the property taken, which they assess to such owner or owners separately, to be by him filed and recorded; and thereupon, such corporation shall pay to said clerk, the amount thus assessed, or secure the payment to the satisfaction of such court, or of the judge issuing the warrant. And on making payment or tender thereof to said clerk, or on giving such security as may be required, it shall be lawful for such corporation to hold the interests in such lands or materials thus appropriated, and the privilege of using any materials on said railway within fifty feet on each side of the centre of such roadway, for the uses aforesaid; the costs of such award shall be paid by the company; and, on motion, by any party interested, and showing said proceedings, the court may order payment thereof, and enforce such payment by execution. The award of said arbitrators may be reviewed by the court of common pleas, or other court in which proceedings may be had, or written exceptions filed by either party in the clerk's office, within ten days after the filing of such award; and the court shall take such order therein as right and justice may require, by ordering a new appraisalment on good cause shown. *Provided*, that, notwithstanding such appeal, said company may take possession of

the property described as aforesaid, and the subsequent proceedings on the appeal shall only affect the amount of compensation to be allowed; if prior to the assessment, the corporation shall tender to such owner or 267 his guardian, if he be unable to contract, an amount equal to the award afterwards made, exclusive of costs, the costs of arbitration shall be paid equally by such company, and such owner or guardian."

For the better understanding of the exceptions taken, we annex the forms made use of, which were prepared by T. WALKER, the solicitor of the railroad company :

INSTRUMENT OF APPROPRIATION.

It is hereby certified that the CINCINNATI, HAMILTON AND DAYTON RAILROAD COMPANY, did, on the day of, 1849, resolve and determine that the following described tract of land and premises, owned and held by..... are necessary for the railroad of said company, and that the same shall be appropriated for said road, viz :

Which resolution is duly recorded among the proceedings of said company.

....., *President*.
....., 1849.

I, clerk of the..... for the county of Hamilton, Ohio, do hereby certify that the CINCINNATI, HAMILTON AND DAYTON RAILROAD COMPANY have deposited in my office the certificate, of which the above is a correct copy, for the purpose of appropriating the property of the said therein particularly described, to the purposes therein specified.

In witness whereof, I have hereunto set my hand and affixed the seal of said court, this 1849.

....., *Clerk*.

PETITION FOR WARRANT.

To the Honorable

For the County of Hamilton, Ohio.

The CINCINNATI, HAMILTON AND DAYTON RAILROAD COMPANY respectfully represent that said company have filed with the clerk of said court a description of certain lands, lying in said county of Hamilton, held and owned by and particularly described and specified in the copy of the resolution and act of the directors of said company, which is hereto annexed, and that said company have delivered to said a copy of said resolution and proceedings, duly certified by the clerk of said court, as appears by the affidavit of the service of the same, attached to said resolution and proceedings; and having been unable to make an agreement with said for an appropriation thereof, said company hereby respectfully pray for a warrant to be issued to three disinterested freeholders of said county, as by law provided, to the end that there may be an assessment of damages and benefits, by reason of such appropriation, and an award made in the premises, by said freeholders.

....., *President*.
....., 184-.

WARRANT.

THE STATE OF OHIO, Hamilton County, ss.

To

..... GREETING.

268 The foregoing petition having been made to the for the county of Hamilton aforesaid and it appearing that the warrant therein prayed for ought to be granted, you are therefore hereby appointed appraisers, as therein prayed for; and you are required to meet on the premises described in said petition, whereof the said is the owner, on the or as soon thereafter as practicable, and then and there, after being first duly sworn, to appraise the damages which the said will sustain by reason of the appropriation of his property, described in said petition, and in making such appraisalment, you shall consider the benefit as well as in-

jury which the said will sustain by reason of such railroad, setting forth the value of the property taken, or damage done to the property, the amount of benefit conferred, and the difference, if any, you shall assess in favor of the said, and having so done, you shall make due return of your doings in the premises forthwith to the clerk of our said court.

In witness whereof, I have hereunto set my hand, and the seal of said court, this day of 18....
....., *Clerk.*

THE STATE OF OHIO, Hamilton County, ss.

Before me, in and for said county, personally appeared and made oath that they would well and and truly appraise the damages which the said will sustain by reason of the appropriation of his property, described in said warrant; and that in so doing they will consider the benefit as well as injury which the said will sustain by reason of such railroad, setting forth the value of the property taken, or the damage done to the property; and the amount of benefit conferred; and assessing the difference, if any, in favor of the said and that they will, in all things, faithfully discharge the duty commanded in said warrant.

Sworn to and subscribed
this day of 18.... }
..... }
..... }

NOTICE OF APPRAISEMENT.

To

You are hereby notified, that have been appointed by warrant of the commercial court of Cincinnati, appraisers to assess damages and benefits resulting from the appropriation of your property described in a certificate, of which a copy was delivered to you on day of for the construction of their railroad by the Cincinnati, Hamilton and Dayton Railroad company. The warrant which is dated the day of, directs said appraisers to meet on the premises on the day of, or as soon thereafter as practicable, for the purpose of making their award, when you can attend, if you see proper.

....., *President.*
....., 1849.

I, do make oath and say, that on the day of, I delivered a copy of the foregoing notice to personally. (Signed)

Subscribed and sworn to before me this day of 18....
....., *Justice of the Peace.*

AWARD.

In obedience to the command of the annexed warrant, to us directed, we the undersigned, disinterested freeholders of said county, did meet at the time and place designated in said warrant, and having been first duly sworn, on actual view we do appraise the value of the property of said 209
therein specified, and the damage done by reason of said railroad at
.....dollars, and we do appraise the benefits which will accrue to said
.....by reason of the construction of said road, at
.....dollars; and the difference beingdollars, we do assess to the said against said company.

Witness our hands and seals this day of 18....
..... L. S.
..... L. S.
..... L. S.

1. The first exception was to the jurisdiction of the commercial court. This court, it was said, cannot take jurisdiction under any circumstances; for although it is a court of record, it was not organized when the general railroad act was passed, February 11, 1848. This court was

created February 4, 1848, and the judge elected and commissioned the same day. But it was not organized by the appointment of a clerk until the 28th of February, 1848.

This exception was overruled.

II. The petition for the appointment of appraisers did not set forth the acceptance by the company of the general law of February 11, 1848; and in matters of this kind the utmost strictness is required. (7 Hill, 8; 1 Howard's Miss. Rep., 479; 2 Paige, 116; 6 Paige, 564; 2 Bland's Chy. Rep., 128; 7 Man. & Gr., 253; 11 Ohio, 293; 7 Dana, 81; 15 Conn. Rep., 312; 17 Ohio, 340; 1 Barbour's S. C. R., 286; Smith on Construction, section 637.)

This exception was overruled.

III. The act of appropriation is defective. For, 1. The secretary should have certified the resolution, and not the president. (1 Howard's Miss. Rep., 479.) 2. There should be the seal of the corporation. 3. The description of the property appropriated does not show the nature of the right, whether fee simple, or right of way.

This exception was overruled.

IV. This property lies within the city limits, and there is no power to come within the city. The words are "from the city," etc.

This exception was overruled.

V. The award is not made by the freeholders named in the warrant. There is no warrant appointing the *three* freeholders who return the award. The warrant must be issued either by the court in term or a judge in vacation. A judge in vacation had no authority to change or alter the warrant issued by the court in term. But admitting that the judge in vacation had authority after an order made, on one application *by the court*, to make another order appointing appraisers—which, however, is not admitted—there was no new order or warrant, but an attempt to add to, change, or alter a former one. Two of the appraisers or arbitrators could not act—they were discharging a judicial duty—all must be present. Whether a majority could govern, is another question. 21 Wend., 211, 218; 7 Cowen, 526, 530; note and the authorities there cited. If two could act, the illegal or unauthorized introduction of a third would vitiate the award.

To understand this exception, it is necessary to state that, *during the term*, Judge KEY, on petition, appointed Torrence, Taft, and Dubbs, to act as arbitrators. Dubbs declined, and *in vacation*, Judge KEY, by endorsement on the back of the warrant, appointed Snyder in the place of Dubbs, simply signing "T. M. KEY," without any official designation. And the counsel for the company insisted that the warrant is sufficient.

First, the vacancy of Dubbs could be supplied in vacation, without reappointing the other two. The appointment might be made by separate warrants. It is not an indivisible thing. And the law never requires a vain thing.

Secondly, the endorsement on the warrant is a sufficient appointment. 1. It is a warrant of itself. It comes within the definition given by Webster and the law dictionaries. The papers show T. M. Key to be the judge of this court, and the court records show it. And no seal is necessary, unless specially required. Swan's Stat., 574, 575.) 2. It is a part of the original warrant. 3. The award of two would be sufficient. (*Young v. Buckingham*, 5 Ohio, 485; *Willyard v. Hamilton*, 7 Ohio, pt. 2, 111.

This exception was overruled.

VI. *Notice is given* that the three persons named in the warrant would act. If there is a change in the persons, notice should be given of such change; otherwise it is a fraud and surprise on the party. Notice of the time and place of the meeting of the appraisers or arbitrators should be given, whether required by the statute or not. In the construction of all laws authorizing any tribunal to decide on rights of persons or property, this is *implied* on the principles of natural justice. (56 Eng. Com. L. R., 507; 30 E. C. L. R., 233; *Painter v. Liverpool Gas Co.*, 6 Nev. & Man., 736, S. C., 30 E. C. L.; 7 T. R., 270; *The Mary*, 9 Cranch, 144; *Bowler v. Eldredge*, 18 Conn. Rep., 10.) In this case there was either no legal notice, or a deceptive one. In fact the award was not made at the time appointed, but three days afterwards. If notice was necessary, the proceedings cannot be sustained.

To this it was replied:

1. The statute does not require notice. (2 Wharton, 277.) 2. If the common law does, it is sufficient if the party is put on his guard. The insertion of the names of appraisers is surplusage. If the defendant was misled, he must show it affirmatively. The notice itself provides for a continuance from day to day.

This exception was overruled, the court holding that no notice was required, either of the petition for a warrant, or of the persons appointed arbitrators, or of the time and place of meeting, or of the award, but only of the act of appropriation.

VII. The award is not in accordance either with the warrant or the statute. The law and the warrant require that the award should set forth, 1. The value of the property taken. 2. The damages done to other property, or the part left. 3. The benefits conferred. The warrant, if not construed as requiring the above findings separately, was uncertain and calculated to mislead; as restricting the appraisers or arbitrators, in estimating damages, *to the property taken*. The statute itself is so vague, indefinite, and uncertain, that no proceeding can be predicated upon it. At any rate, this vagueness and uncertainty having been carried into the warrant, as is admitted, the award to be good should clearly show that the arbitrators did not restrict themselves in their estimate of damages to the apparent letter of the law and warrant, but enquired into all damages which would be, in right and justice, proper.

To this it was replied: If the warrant misconstrues the law, it is surplusage. For its function is to appoint appraisers, not to direct them. And if the award follows the law, in defiance of the warrant, it is right.

This exception was overruled.

But in the course of the argument, the court requested the counsel for the railroad company to furnish in writing their construction of certain portions of the 9th section of the charter, which was done as follows: The counsel for the railroad company claim that the charter shall be construed as follows—

1st. As to the powers of this court to review. We claim the court cannot enquire into the actual value of the property taken, or damage done to property. This is a matter to depend upon the judgment of the commissioners or arbitrators, and this court can only set aside the valuation for fraud on the part of the arbitrators, or on account of the arbitrators having assumed a wrong principle of action.

The charter authorizes the court to *review* the award on written exceptions filed in ten days—"and the court shall take such order therein

as right and justice may require, by ordering a new appraisement *on good cause shown.*"

We contend the good cause shown means such a substantial cause as in the call of an ordinary arbitration would authorize the court to set aside an award. These causes are set forth in Swan's Stat., p. 69, section 11.

We claim, therefore, that no objection can be taken, except such as are filed in writing within ten days after the award is filed; and these exceptions must be such as are substantial, not formal.

2d. As to the construction of the statute as to compensation, we claim that the great object of the statute is to enable the company to take the property and materials necessary to construct the road, and at the same time to secure to the owners of property on the line, a fair compensation for the injury or damage done them. This damage may consist, first, in the taking of a piece of property, the value of which is \$1000. By paying that sum, the owner would be compensated. But the owner may sustain damage to other property owned, by the property being injured either by digging trenches, taking of materials, or traveling over the property in order to obtain materials on other lands, and where such is the fact we suppose the term damage used in the charter covers the case.

Another view may be taken of the charter, by supposing the words *value* and *damage* to be used as synonymous; and this view is strengthened from the use of the word *damage* in the upper part of page 8 of the charter; after providing for the depositing of a copy of the act of appropriation, provides the judge shall appoint three freeholders "to appraise the damages which the owner of the land may sustain by such appropriation." Here the court perceive this is all that need be stated 273 in the warrant. The succeeding part of the charter is merely directory to the arbitrators; they are to be sworn and return their assessment of *damages* to the clerk, setting forth, 1. The value of the property taken, or damage done to the property; 2. The amount of benefit conferred; 3. The difference between the value or damage done, and the benefits conferred, *which they assess*. So that the term *damage* which the owner may sustain, may consist in the value of the property taken, and the injury done to land not taken; or it may consist of nothing but the value of the land taken; or it may apply only to the property injured; hence the language *value of or damage done*, are both included in the word *damages* used in the previous part of the same section. This view is also strengthened by finding the word *the* after *damage* done to, and before the word found in the published law not in the pamphlet copy.

We claim that the court if in session, and the judge in vacation, are each clothed with the same power to appoint arbitrators. And where it becomes necessary to make a substitution, the court could make the change if in session, and as the judge, as such, has the same powers in vacation, he may make the appointment. As to the omission to attach the official character of the judge to the name, that is never held necessary, provided it appears on any part of the paper that he is acting in an official character. In this case the warrant names Thomas M. Key as judge of the commercial court; all the papers also make the same reference, so that

it sufficiently appears that Thomas M. Key was acting in his official character.

CHARLES FOX,
ALPHONSO TAFT,
CHARLES ANDERSON,
T. WALKER.

And at this point the court delivered an opinion upon the fifth, sixth, and seventh exceptions, in substance as follows :

As to the objection that the appraisers were not duly appointed. The endorsement, standing alone, is not a warrant ; but being endorsed on the warrant it is part of it. And the want of official designation is supplied by the reference in the warrant to the petition. But it has no seal. Is this fatal? The statute does not require it. Some of the statutory warrants must be under seal, others not. There is no general rule. In this case a seal is not necessary. Is this then a warrant? The construction must be reasonable. A separate warrant is not required. The endorsement is not an attempt to amend, but to add to the original warrant. The three arbitrators need not be in the same warrant. And a vacancy can be supplied in vacation, without reappointing all three. Two appraisers cannot act alone; three must be present, although two might make the award. 274

As to the want of sufficient notice. The statute does not in terms require any other notice than that of the filing of the instrument of appropriation. Is any other notice required? This is not a judicial proceeding, unless on review. Notice therefore of the appointment, and of time and place is not necessary.

As to the objection that the award was not made at a proper time. The statute requires no particular time, nor does justice to the parties. But in this case the warrant fixed a day, "*or as soon thereafter as practicable.*" And it does not appear that the arbitrators did not make the award as soon as they could.

As to the objection that the award is not pursuant to the warrant or the charter. The object is to get at the "damages sustained by reason of the road." This includes three things—the value of property taken—other damage, if any—and benefits—the latter to be deducted from the two former. This the award has done. It is in strict compliance with the statute.

VIII. The *description* in the instrument of appropriation does not properly set forth "the rights and interests intended to be appropriated," as required in the second paragraph of the ninth section of the general railroad law. It merely describes so much land, by metes and bounds, as appropriated for the railroad. Several questions were made under this head, which the court disposed of as follows :

1. Must the whole tract be described, or only the part taken? I answer, only the part taken. This is all the law requires. 2. Must the grade be set forth? It is not necessary; the law does not require it. 3. Must the description claim one hundred feet, in all cases? The words are ambiguous. The construction I give is, that one hundred feet is the limit, but the company may take less, and then cannot go beyond for materials. 4. What is the meaning of "*rights and interests*?" I agree to the doctrine of a strick construction, but this means the ascertaining of the clear and rational meaning of the words employed. These words do not require the owner's title to be described, nor the nature of his estate. But they mean the rights and interests "intended to be taken,"

that is, the "use" the company intends to make of the thing taken. 276 The description only says, that the land is appropriated "for the railroad." Is this sufficient? I think it is. The inference is clear, that this is only to be used for a railroad track, and not for side tracks, depots, and the like.

IX. The charter requires the arbitrators to return their award "forthwith;" and this was not returned until ten days had elapsed.

The court held that *forthwith* did not here mean *instantly*, but within a reasonable time, and ten days was a reasonable time.

X. In the case of the cemetery, the same exemption from appropriation to public uses was claimed, as in the application for an injunction, before reported. (*The Proprietors of the Cemetery of Spring Grove v. The Cincinnati, etc., Railroad Company.*)

On this point, the ruling of this court was the same as that of the superior court, and was in substance as follows:

The amendment of the cemetery act, giving power to sell, has no effect upon the question. Eminent domain is inherent in sovereignty, in whatever form government may be organized, and is an inalienable right. Even a constitutional provision could not divest the government of this right. But in our constitution, the right is expressly reserved, though this was not necessary. The exigency must be determined by the legislature alone. If any property might be exempted, there can be no limit fixed. The cemetery is a *public* use, as well as the railroad, but this does not affect the question; for the appropriation to one public use, does not prevent a subsequent appropriation to another. But may not both appropriations stand? or rather, is there not an implied exception in the railroad grant? There is not. The words are "any land," including all land.

The conclusion is, that the exemption is wholly void, and the appropriation authorized.

XI. The eleventh exception was, that the award was too low, and oral testimony was offered to sustain it.

The counsel for the company claimed—1. That the testimony must be in writing, according to the general usage in such cases. 2. That no testimony can be received, except that which tends to show fraud or misconduct in the arbitrators; or misconception in regard to some material fact; or the adoption of some erroneous principle of law. A mere honest difference of opinion as to value, where there is no mistake of fact, or misapprehension of law, will not be "*good cause*" for setting aside the award. (2 Wend., 398, *Bouton v. Brooklyn*; 20 Johns. 439, *Le-Roy v. New York*; 19 Wend., 694, *Matter of William st.*; 5 Wharton, 461, *Willing v. Baltimore Co.*; 17 Wend., 649, *Matter of Furman st.*; 276 1 Binney, 59, *Lower Dublin v. Paul*; 4 Wharton, 47; *Phil. Co. v. Grimble*; 3 Rawle, 84, *McCalmont v. Whittaker*; 5 Serg. & Rawle, 51, *Large v. Passmore*; 2 Richardson, 434; 6 W. Law Journal, 278.)

On the other side it was contended that the question whether the evidence must be in writing or oral, was one of convenience merely; and by general consent of court and counsel, it was resolved to exclude *ex parte* affidavits, and to examine the witnesses orally or by depositions taken on notice.

It was also insisted that any evidence would be competent, which tended to show that substantial justice had not been done. (*Bennet v. Camden R. Co.*, 2 Green, 145; *Vanwinkle v. Camden R. Co.*, 2 Green, 162; *Kyle v. Auburn R. Co.*, 2 Barbour Chy., 497; *New Jersey R. Co.*

v. *Suydam*, 2 Harrison, 25; Matter of Pearl street, 19 Wend., 651; Matter of Cherry street, 19 Wend., 659; 5 Blackford, 543; 8 Watts, 243; *Brooklyn v. Patchen*, 8 Wend., 47; *Summons v. Cincinnati*, 14 Ohio, 174.)

The decision of Judge KEY was in substance as follows:

By filing the appropriation, the right become a vested. The only question remaining is as to compensation. The application must be favorably considered. The terms "*right and justice*" are legal terms, and refer to the existing law. But what is the meaning of "*good cause shown?*" It is admitted that exceptions to fraud, ignorance of fact, or mistake of law, may be sustained by evidence. Now the valuation might be such that court would infer one of these causes; and hence, testimony of over or under valuation may be admitted, to establish this inference. But the court go further, and say that mere inadequacy or excess is good cause, and may be shown by proof. There is no notice of the appointment of the arbitrators, nor right of exception to the persons appointed—no specific directions to arbitrators as to mode of proceeding. No notice of time or place, and no time or place fixed by the statute. No means of procuring testimony, and no obligation to hear argument or suggestion. Hence the award ought not to be conclusive. The parties must have an opportunity to be heard—a day in court—on the mere question of compensation. Nor will the fact that the party had notice, and was there, and was heard, make the award conclusive as to value—without misconduct, error or mistake. This would be contrary to natural justice. There always will be considerable diversity of opinion as to value, among fair minded men; and it would not be good cause to show merely the ordinary diversity. The court must have strong grounds to believe that gross injustice has been done, beyond the limit of ordinary diversity. But mere opinions without facts, would have little weight.

The argument drawn from great trouble and expense, cannot avail.

The court will hear any testimony tending to show that substantial justice has not been done to either party.

MASTER AND SERVANT.

369

[Hamilton Common Pleas, February Term, 1850.]

JOHN STEVENS v. THE LITTLE MIAMI RAILROAD COMPANY.

[Reported by P. MCGROARTY.]

A plaintiff suing for negligence, must himself be without fault.

The rule of law that the principal or master is liable to third persons for the non-feasances, negligences, and omissions of duty, of his servant or agent, applies to cases of different servants employed by the same master, where one by his non-feasance, or negligence, or omission of duty, does an injury to the other.

In such case, the servant cannot maintain an action against his fellow servant.

The servant is responsible only to his master for such nonfeasance or negligence.

The privity of contract in ordinary employments is between each servant and the common master, and not between one servant and another.

Each servant, as to the contract of service between his master and another servant, is a third person or stranger, in the legal acceptance of those terms.

This was an action on the case, and the facts were substantially as follows:

The plaintiff was engineer of the locomotive, on the train which left Cincinnati for Springfield on the 13th of August, 1846, and which came into collision with the descending train, between Columbia and 370 Plainville. It appeared, that up to that day, the trains passed each other at Plainville, and that the rules for running, directions where to pass, etc., were contained in what were called "time cards," with which the conductor and engineer were both furnished. Evidence was offered by the plaintiff, to show that a change was made in the regulations, whereby the trains were to pass at *Columbia*, instead of Plainville, the change to take effect for the first time on the day in question; that the persons on the descending train had been properly notified of the change by altered "time cards;" but that the time cards intended for the train on which the plaintiff was engineer, were delivered to one of the agents of the company, who retained them until after the accident. It appeared, that the plaintiff had made a slight stoppage at Columbia, and had inquired of the conductor of his train whether the trains were not to pass that day at Columbia, but was informed that they were to pass as usual at Plainville, and that the change of place was not to be made until the succeeding Monday or Wednesday. The plaintiff proceeded at the usual speed towards Plainville, ringing the bell, and blowing the steam whistle, from time to time, and was "running the curves" where the collision took place at the usual rate. Some of the witnesses testified, that he was proceeding at the rate of from ten to twelve miles an hour when they saw the other train—and one of them, an engineer, stated that from the ringing of the bell, the sounding of the whistle, etc., he apprehended some danger, and went aft on the passenger car. At no time previous to the collision, did the plaintiff or the conductor, send a man ahead. When the descending train first appeared, Stevens immediately reversed his engine, for backing, as also did the engineer on the opposite locomotive. The locomotives came together in about thirty seconds, the wood car threw up the water tank, and when the plaintiff was sought to be rescued, the flat iron bar of the water tank was across his back, and held him with his face to the boiler; the wood had knocked the gauge cocks open, and the hot water and steam were running and blowing out on the person of the plaintiff. There was evidence to show that the person who had the time cards was on the descending train, and that he attempted to deliver them *after the accident had happened*, and the defendant produced a witness who testified, that not only had the cards been delivered to that person (whose duty it was to hand one of them to the plaintiff), but that a copy of one had been made 371 out at the office, and delivered to the conductor on the plaintiff's train. The defendant also offered in evidence certain "instructions to conductors and engineers for running trains," which were in force at the time of the collision, of which rule No. 10 provides: "In cases of *uncertainty* as to the occupation of the track, a man must be sent ahead or back, and *kept* at least one hundred rods distant until the danger is over." Testimony was also offered tending to prove, that if there was apprehension of danger, the ascending train proceeded in an imprudent manner. Witnesses were examined as to whose duty it was to send a man ahead in such case—that was said to be an unsettled question on the road—but William Hazen (himself a conductor) said: "The conductors have charge of the trains, not the engineers." Some admissions of the plain-

tiff were offered in testimony, and it was insisted by the defendant, that he expected or feared a collision. It was shown, that for some time, the recovery of the plaintiff was entirely doubtful, and that his injuries were permanent.

There was a great mass of testimony, but the above, with the arguments of counsel, and the charge and opinion of the court, will sufficiently exhibit the legal questions involved.

Mr. Zinn, for the plaintiff, opened the case to the jury, and submitted the following propositions of law:

The principal is responsible for the neglect or carelessness of the agent, while acting within the scope of his agency. *Story on Agency*, 465.

It is also clearly established, that the servant is not responsible to third persons for nonfeasance or mere neglect in the performance of duty, although he is for positive torts or trespasses, for no person can authorize another to commit a wrong. *Story on Agency*, 316; 1 Bl., 431.

If the plaintiff cannot maintain his action against the company, he is without remedy.

If an agent sustain loss in the business of his agency, and without his own default, he is entitled to full indemnity. *Story on Agency*, 339; *Ramsey v. Gardner*, 11 Johns., 439; *Powell v. Trustees of Newburgh*, 19 Johns., 284; *D'Arcy v. Lisle*, 5 Binney, 441; *Stocking v. Sage*, 1 Day, 522.

A municipal corporation is liable for injuries resulting to the property of others from the acts of such corporation, though acting within the scope of its corporate authority, and without any circumstance of negligence or malice. *Rhodes v. Cleveland*, 10 O. R., 159; *McCombs v. Akron*, 15 O. R., 159.

If municipal corporations be so responsible, surely private corporations are responsible for negligence. 372

Although the plaintiff was not to blame, there are cases where plaintiffs who were slightly in fault were permitted to recover. *Lynch v. Nordyke*, 1 Ad. & Ellis, N. S., 29.

Mr. Z. also cited 4 Bing., 628, *Aylott v. Wilkes*, 3 B. & Ald., 304.

Mr. Fox (for the defence). This is a case of first impression in the state of Ohio.

No man can sustain an action against his employer for the negligence or unskillfulness of his coworkman. *Farwell v. Boston and W. Railroad Co.*, 4 Met., 49; *Priestly v. Fowler*, 3 Meeson & Welsby, 1; 6 Hill, 592.

Public policy forbids the extension of the rule of liability on the part of a master for acts of his servant to cases of injuries sustained by one servant in consequence of the neglect or carelessness of another servant.

There is no case where such an action has been sustained. *Priestly v. Fowler*, 3 Mees. & Wels., 1; *Farwell v. Boston and Worcester Railroad Co.*, 4 Met., 49.

If the plaintiff by his own negligence has contributed to the injury, he cannot recover. 6 Hill, 592.

Mr. Fox asked the court to charge the jury:

1st. If the jury are satisfied that the plaintiff was employed by the defendant to run one of the engines, at the time of the collision, and that he was injured by the negligence of A. B., the conductor of the cars at-

tached to the locomotive, in ordering him to proceed from Columbia on his way to Springfield, instead of remaining there until the train coming down the road arrived at that place, according to the change agreed upon as to the passing place, he cannot recover in this action, but his action, if any, is against A. B.

2d. Where two or more persons are employed by an individual or company, and in doing the work they are employed to do, one of them by negligence and inattention, causes an injury to the other, no action can be sustained against the employer, whether an individual or a company.

3d. That if it was the duty of the superintendent of this company to furnish time cards, and he omitted to do so, or if he gave them to C. D. with directions to deliver them, who neglected to do it, and, by reason of the negligence either of the superintendent or of C. D., the plaintiff has been injured, he is not entitled to recover, because the negligence of these persons is not the negligence of the Little Miami railroad company.

4th. Where men engage to work in hazardous occupations, they engage to run the risks of injuries arising from the negligent acts of other workmen, or men employed by the same employer, and that the policy of the law does not render the employer liable for such negligent acts of a coworkman.

(Charges 5 and 6, relating to the negligence of a plaintiff, were given by the court as asked.)

7th. If the jury believe the plaintiff had been notified, whether by card or otherwise, that the place of passing by the up and down trains, was to be changed from Plainville to Columbia, he ought to have stopped at Columbia the time stipulated for the arrival of the other train, and if he neglected to stop, and this caused the collision, or contributed to the collision by which he was injured, he cannot recover in this case.

8th. If they believe the plaintiff was in doubt and uncertainty as to whether the trains ought to pass at Columbia instead of at Plainville, and if they believe the plaintiff expected to meet the down train, between Columbia and Plainville, it was his duty to run slow; and if it was prudent, and according to the usages of engineers, and required by the *printed rules* of the company, in cases of doubt and uncertainty to send a man ahead of the train, and keep him from one hundred to one hundred and fifty yards ahead of the engine, until the bends and curves in that place had been passed, and all apprehension of danger was over and the plaintiff neglected to send a man ahead as required by prudence, and the printed rules, and such neglect contributed to bring on the collision, and produce the injury, the plaintiff is not entitled to a verdict.

Mr. Pugh, in closing the argument for the plaintiff, fully reviewed the authorities cited, and positions taken, by Mr. Fox; contending that there was no distinction in *principle* between the case of a servant suing his master for the negligence of another servant, and that of a stranger suing the master for a like negligence, and that the cases cited were not absolute authorities in the state of Ohio. That the case in 6 Hill did not necessarily decide the point involved in *this* case; that the reason given for the decision in Massachusetts was bad, it being held by the court in that case, that the suit should have been against the servant himself, and not against the master; whereas, by the well settled rules of law,

no action whatever would lie against the servant in such case, 374
there being no privity of contract.

He concluded by asking the court to charge: That if the jury find that it was the established custom of the defendant to deliver time cards to her engineers and conductors, indicating to them the place of meeting and passing another train, and such custom was known to both parties, at the time of making the contract of employment, it was the duty of the defendant to notify the plaintiff, by a time card or otherwise, of any change in the time and place fixed for meeting such other train. And if the defendant failed to give such notice to the plaintiff, and the plaintiff obeying the express orders of the defendant previously delivered to him, did, without his own fault, and whilst using due care and diligence in the business of his employment, receive an injury in consequence of the want of such notice, the defendant is liable to an action.

WARDEN, P. J., after stating the case to the jury, and calling attention to the ordinary rules of evidence applying to the case, said:

If it appear, that the negligence of the plaintiff materially aided or contributed to the injury, you must find for the defendant. In this particular case, if you find that the time cards were furnished, or that the plaintiff positively *knew* that the change was to take place at Columbia, instead of Plainville, it may be a question of mixed law and fact, whether the mere command of the conductor was sufficient to excuse the plaintiff for proceeding. We cannot undertake to determine what are the relative positions of the engineer and of the conductor, as to authority, or how far the engineer may excuse himself for obeying the conductor's order. These are questions of fact, rather than of law. You will inquire who had *control* of the cars. You will inquire, whether Mr. Stevens knew of the change, and whether, if he proceeded notwithstanding, it was in obedience to the orders of a *superior officer*, and in such manner as a prudent and skillful engineer would have done. We cannot charge you, *absolutely*, that, even if the plaintiff *knew* of the change, he was authorized to disobey his superior officer; for he might, perhaps, have proceeded in such a manner as to avoid collision. If he *could not* safely proceed, it is certain he should have disobeyed. We consider all these matters as peculiarly within the province of the jury. All we feel bound or willing to say is, that these "time cards" appear to contain the 375
rules by which the engineer was to be governed, and if so, he was bound by his contract to obey them. They have been offered in evidence, and you will inquire whether they were in force at the time; if they were, you will examine the facts, and ascertain whether the plaintiff conformed to them. If he did not, and his non-compliance aided or contributed to the accident, we charge you, that the plaintiff cannot recover. We are unable to say, as a matter of law, how the plaintiff should have proceeded, except as the testimony has shown and these printed rules disclose. Keeping these in view, you will determine whether the plaintiff acted in a prudent, careful, and skillful manner, or whether he acted imprudently, carelessly, and unskillfully, and so caused his own injury. In the latter case, you will find for the defendant.

The court then proceeded to examine the question raised by Mr. Fox as to the entire want of legal right in the plaintiff to sustain his action; but as the opinion was more fully given on the motion for new trial, it is unnecessary here to insert it.

The jury having returned a verdict in favor of the plaintiff, assessing his damages at \$3,700, the defendant moved for a new trial. 1. Be-

cause the verdict was contrary to law and evidence. 2. The court erred in its charge and rulings. 3. Because of the discovery of additional testimony. 4. Because the defendants were surprised by the non-attendance of an important witness.

On the argument of this motion, Mr. Fox, contending that the verdict was contrary to the instructions of the court as to the alleged negligence of the plaintiff, cited the following additional authorities to that point: *Bames v. Cole*, 21 Wend., 188; *Hartfield v. Roper*, *ib.* 615; *Rathbun v. Payne*, 19 Wend., 399.

Mr. Fox also moved the court to arrest the judgment, because the case as stated and set forth in the plaintiff's declaration, if true, shows no cause of action, and does not entitle the plaintiff to recover.

These motions having been fully argued by Mr. Fox for the defendant, and by Mr. Zinn for the plaintiff, the opinion of the court was pronounced by WARDEN, President Judge, as follows:

The motion for a new trial in this case is urged, first, because of newly discovered testimony. The court has examined the affidavits presented, and we consider them as merely cumulative, and cannot see how they would have changed the result had they been before the jury. It is said, however, that the verdict is contrary to the evidence actually introduced, and to the law as announced by the court. No complaint is
376 made against the charge of the court, except as to the question on which the motion in arrest of judgment depends; as to the general questions of law, the charge is admitted to have been correct. We think the facts of the case were fairly presented by counsel, and that thus the whole case went to the jury on its merits. Whether *we* would have rendered the same verdict, had we been charged with the duty of ascertaining the facts, is not now to be considered—if it were, we have little doubt that we would have come to a similar conclusion. We are not of opinion that the plaintiff *knew*, in any manner, that the change from Plainville to Columbia was to be made on the day in question; that he *suspected* or *conjectured* so, seems to be fully proven; but that he had positive knowledge, or any such information as would weigh against the statement of the conductor, that the change was *not* then to take place, no one can believe from the evidence. It is not *reasonable* to suppose that the plaintiff would have endangered his own life by proceeding, when he *knew* that the conductor was mistaken. But if he was simply *uncertain*, what was his duty? was he to disobey the conductor's command? was the conductor *competent to command* him? At the trial, we left it to the jury to say whether the conductor was the superior officer or not; and we said, that even if the plaintiff *knew* of the change, it might be a question whether, if he could proceed with safety in any manner, he was not bound to proceed, using due precautions to avoid collision. As a matter of fact, we are well satisfied, that the conductor is the commanding officer; such is the positive testimony of one witness—and such would be the inference from the very *title* of his office. The time cards, it is true, are addressed to both engineers and conductors; but we cannot suppose, that this makes them equal in authority—the regulations are given to both, subject to their relations as to superiority or inferiority; and it cannot be a peculiarity of railroads, that the lives of passengers are placed at the mercy of *two* men, equal in authority, and each capable of defeating the arrangements of the other. There must be a head—a master—a *captain*; and we suppose such to be the character of the conductor. If so the principle of subordination would have required the engineer to obey, if he could

possibly do so; and this defendant, at least, cannot complain that he thus observed the discipline prescribed by his employment. With the passengers, it might be different; but all know the importance of perfect discipline and subordination wherever there is danger to be encountered. It is said, however, if he did proceed, he ought to have run slowly, and sent a man ahead as required by the printed rule in case of uncertainty. Perhaps he ought; but we cannot so find from the evidence. His doubts may have been removed by the information and command of his superior officer; and if they were not, we left it to the jury to say, whether it was the duty of the *engineer* or of the *conductor* to send a man ahead. We suppose, they ascertained it to be the duty of the *conductor*—and such is our own opinion from the evidence. On the whole, therefore, we are satisfied that the jury could have properly found from the evidence, that the plaintiff was without fault. 377

An objection is made, that the damages are excessive; but, in view of the serious hurts of the plaintiff, we think the verdict reasonable.

The motion for new trial must be overruled.

The motion in arrest of judgment remains to be considered. If the *dicta* in *Priestly v. Fowler*, and *Brown v. Maxwell*, and the deliberate and elaborate opinion of the court in *Farwell v. Boston and Worc. R. R. Co.*, are to be regarded as law, or as authorities binding this court, the declaration states no cause of action, and the judgment must be arrested. It is idle to say, that the case in *Metcalf* is not directly in point. The case is, in our opinion, precisely analogous to the present; and the very point here involved is substantially there decided. We have no respect for either of the other cases. In *Priestly v. Fowler*, it was not necessary to decide the question—and Lord Abinger, who there pronounced the opinion says: "It is admitted, that there is no precedent for the present action by a servant against a master. We are, therefore, to decide the question upon general principles, and in doing so, *we are at liberty to look at the consequences of a decision the one way or the other.*" If the master be liable to the servant in this action, the principle of that liability will be found to carry us to an alarming extent." His lordship illustrates the sources of his anxiety, and shows the "alarming" consequences of *announcing the law as he found it*, by stating this truly pitiable case: "The master, for example, would be liable to the servant for the negligence of the chambermaid, for putting him into a damp bed," etc. We have great respect for authority; but we congratulate ourselves, that if the *reasoning* of this very remarkable case fail to convince us, we are not controlled by its *authority*. As we said at the trial, the answer to all this statement of the dreadful consequences of announcing a plain principle of law, is contained in a familiar maxim—*the law cares not for trifles*. As to the New York case, Judge Beardsley does not decide the question, but intimates that he would do so, on the authority of this English case and that in Massachusetts. 378

At the trial, we characterized the doctrine of these cases as an unauthorized restriction and limitation of the ordinary rule, by which a master is held responsible for the act or the omission of his servant. And whereas, the court in two of the cases cited, state that there is no precedent for the claim of the plaintiff, it may be replied, that prior to the year 1837, when Lord Abinger gave his opinion, there is no precedent for such a restriction or limitation. But, in truth, the want of a precedent for an *action* on the case, is no objection whatever. The circumstances on which such an action may be founded, are as various and as

changing as the face of society itself; and it is only necessary to apply principles to any set of facts, in order to determine whether an action can be maintained or not.

But if there be no precedent of such an action, the principle on which the case depends, is well settled. It is the broad principle, stated in the books without qualification or restriction—*qui facit per alium, facit per se*. This is the rule given in Blackstone, who says, "the master is answerable for the act of his servant, if done by his command, either expressly given or implied; *nam qui facit per alium, facit per se*." 1 Bl. 430. It is the consequence of this principle, that what a man omits or neglects to do by another, he omits or neglects to do by himself. The court in the Massachusetts case mistake an *illustration* of the rule for the rule itself. Blackstone, among other *instances* of applying the principle he has stated, says: "If a servant, lastly, by his negligence does any damage to a stranger, the master shall answer for his neglect; if a smith's servant lames a horse while he is shoeing him, an action lies against the master, and not against the servant." This is not a definition; it is an illustration. The writer is inquiring: "III. Let us, lastly, see how strangers may be affected by this relation of master and servant; or how a master may behave towards others on behalf of his servant; and what a servant may do on behalf of his master." But even if it were a definition, can any one suppose that the word *stranger* means

379 here one not acquainted with the *person* of the parties—one who is not a friend, a cousin, a servant, or the like? Does it mean anything more than one who is not a party to the contract of service? One who has no privity in law? We think not. If we are right, will any one contend that there is any privity of contract between one servant and another, as such? Is not the contract *personal* in each case? We hold that each of several servants employed by the same master, is as to his fellow servant, a *stranger* in contemplation of law.

We are of opinion, that even under the doctrine of the Massachusetts case, the plaintiff may maintain his action. For the court there say, that the action must be against that person between whom and the plaintiff there exists privity of contract. They do, indeed, deny the application of the rule to such a case as this; but they intimate that the action should have been against the servant himself—an intimation made without proper consideration. For, if the plaintiff had sued his fellow servant, he would have been turned out of court on the ground that there was no privity of contract, and that as to negligence or nonfeasance, the servant is responsible to his master, and not to his fellow servant. So that, in this particular case, if the plaintiff cannot sue the company, his grievous wrong must go unredressed! We are not prepared to announce so monstrous a doctrine—so repugnant to natural justice, and, as we think, to the well settled principles of law—until the voice of the highest authority commands us. When our own supreme court adopts the doctrine, we shall declare it, not because we think it right, but because such will then be our duty.

We may be bold in refusing to recognize the cases cited as authority. For one, my position in this case has not been pleasant. But I have less hesitation in stating my opinion, than I would otherwise have felt, because I have found that one of the most eminent jurists this country has produced, receives with doubt the doctrines of these cases, and characterizes them as the opinions which seem to be maintained "*at present*." Story on Agency, section 453*d*. And, not without good reason, Chief

Justice SHAW, himself, in 4 Metcalf, adds "a caution against any hasty conclusion as to the application of this rule to a case not fully within the same principle." We accept the caution, and deny the application of the principle to this case. At the trial, we asked of counsel for the defence to suppose this case: Were this road owned by A. B., who employed C. D. as engineer, engaging *himself* to furnish time cards—should he neglect to do so, could not the engineer recover? If he could, can A. B. excuse himself, by simply showing, that he employed an *agent* to act for him, and that agent failed to perform his duty? These questions were suggested by a passage in Story on Agency, section 453c., where the writer reviewing the cases cited by the defendant as authority, says: "In neither of these cases, could there be the least doubt that the principal would have been liable; if the injury had been occasioned by his own personal negligence, or omission of duty." 380

It is, however, further contended, that public policy is against maintaining the action. If to maintain the action, will not have the effect of forcing men to employ good servants, we are unable to understand the relations of master and servant. It is said, too, that these are perils incident to the service, and that the rate of compensation may be regulated accordingly. The answer is, that they are not perils *properly* incident to the service—and that the rate of compensation is not, and never can be, regulated accordingly. You cannot estimate the value of life or limb—you cannot estimate the risks of either. It is idle to say, that an engineer whose rate of compensation is fifty dollars per month, has regulated his compensation with a view to risking, not only the perils necessarily incident to his business, but also the negligence of his fellow servants. We are well satisfied, that sound public policy, as well as enlightened humanity, is in favor of the principle we have applied to this case.

The motion in arrest will be overruled.

EMINENT DOMAIN.

392

[Supreme Court of Ohio.]

Before Judge Caldwell, at Chambers.

THE PROPRIETORS OF THE CEMETERY OF SPRING GROVE v. THE CINCINNATI, HAMILTON, AND DAYTON RAILROAD COMPANY.

Appropriation of private property to public uses—Injunction.

[In the preceding number, page 251, we reported the decision of Judge JOHNSTON of the superior court. A contrary decision has since been made by Judge CALDWELL, of the supreme court, of which the editor made the following notes. The case was argued by the same counsel as before.—Ed.]

Judge CALDWELL said he should proceed with the several propositions, he felt called to notice, in their order, beginning with the question of jurisdiction.

1. Has this court jurisdiction, the proceedings being before the commercial court on appeal by the complainants?

The great question in the case is not before that court—that is as to the *validity of the appropriation*. The only question in that court, is upon the amount of the award. This court, therefore, has jurisdiction.

2. Has this court jurisdiction of the case, considered as a trespass?

This is not an ordinary trespass. It involves title on claim of legal right. It is against a corporation, having great powers, and affecting a great many rights. It casts a cloud upon the title, even if the proceedings are illegal, because there is a color of authority. If, then, the proceedings be unauthorized, it is a case of chancery jurisdiction.

3. Is the act of appropriation sufficient to pass the title?

It does not describe the entire tract, but only the superficies of the land to be taken. It does not describe the character or use to be made of the land, nor fix any grade, so as to show the extent of the damage, and bind the company to the grade fixed. All this it should do on principles of justice.

4. Is the warrant sufficient?

Originally it was the act of the court. It fixed no absolute day, but only a given day, or as soon thereafter as practicable. After the named day, in vacation, and without written application, a vacancy in the assessors was supplied by Judge KEY; by a simple endorsement on the 393 warrant. This could not be done. The power was expended in the original warrant, and Judge KEY, in vacation, could not amend the warrant, any more than any other judge. He could only issue a *new* warrant. Again, the want of precision as to the day of meeting may be fatal, unless the assessors actually met on the day named. Again, though the charter is silent as to notice, yet notice is absolutely necessary on general principles. The notice must be precise as to the day. For these defects, he regarded the warrant a mere nullity.

5. As to the right to deduct benefits. The court declined to consider that question, on this application. The case in 14 Ohio Rep., *Cincinnati v. Symmons*, has settled this question for the present, in favor of its exercise.

6. As to pre-payment, the judge did not think any decision had gone the length of determining it sufficient to give security for the payment, at a future day. There must be an unquestionable fund provided, before pre-payment can be dispensed with. The giving of security does not comply with the constitution. The case in the 14th Ohio reports does not go to that extent.

7. Such being the view of the court upon these points, it was not necessary to consider the question of exemption from appropriation in the cemetery charter.

Injunction allowed, on giving bond in \$5,000.

NOTE—The same judge granted an injunction, on the same grounds, at the suit of *Platt Evans*. And Judge WARDEN, president of the common pleas, on the same grounds, granted an injunction at the suit of *Edward C. Roll*.

CONFESSION OF JUDGMENT BEFORE A JUSTICE.

[Court of Common Pleas, Sandusky County, Ohio.]

JACOB STANER v. LEWIS E. STOM.

Certiorari to reverse a judgment of a Justice of the Peace, March Term, 1850

[As to jurisdiction of justices to enter judgment upon cognovit, or judgment notes, by confession, without personal appearance of the defendant.]

The transcript from the justice's docket, showed that the suit was brought on a note of hand, given by the defendant, for \$17.02, accompany-

ing which was a power of attorney, authorizing any one to appear before the justice and confess a judgment against the maker for the amount due in favor of the plaintiff. By virtue of this authority, Ypsilanti A. Smith appeared and confessed a judgment; to reverse which this *certiorari* was brought.

C. K. Watson and John L. Green, for plaintiff, in *certiorari*.
B. J. Bartlett, for defendant.

408

BY THE COURT, PER E. B. SADLER, PRESIDENT JUDGE.

There are two questions presented in this case for our consideration:

1. Whether a justice can enter a judgment against a party by confession, unless he *personally* appears before him?

2. If a party even appear by an attorney and confess, had Smith good and sufficient authority for that purpose?

Although justices' courts are of limited jurisdiction, yet, when their transcripts show they have jurisdiction, all reasonable intendments will be made to sustain their proceedings. The leading objection to the judgment before us is, that the justice had no jurisdiction of the person of the defendant.

The statute declares that justices shall have jurisdiction to enter judgment for any sum not exceeding \$200, when the debtor shall *appear before* him, without process, and confess the same. Swan's Stat., 506, section 1.

It is urged that under this statute the debtor, to give the justice jurisdiction of his person, must personally "appear before him," and cannot appear by attorney. To enable him to do so, a special authority must be given by statute.

It is a common law right, that every one possesses power to employ attorneys to transact his ordinary business, or to act for him in any particular transaction. And it is a legal maxim, that whatever a man does by his attorney, thus employed, he does himself.

Why should not a person then be permitted to employ or appoint an agent to confess a judgment for him? If he wishes to save himself the trouble and expense of going before the justice, or is unable to go, why should he not be permitted to appoint some one to go in his stead? Shall he not be permitted to save the expense of the issuing and service of process, when he cannot appear in person, by appearing by attorney? Did the legislature, by the language used in the statute, intend to abridge this common law right, of acting by attorney, and require the defendant to appear in person? We think not.

Some years ago a statute existed in the state of New York, which prohibited the plaintiff, before the justice, from appearing by attorney, unless it was *proved* to the justice that he was a nonresident of the county, or otherwise disabled from attending. The courts of that state held, this statute was an abridgement of the plaintiff's common law right to appear by attorney, and that without such statute, he could so appear. 4 John. Rep., 228. The statute of New York, authorizing confessions of judgments before justices, was similar to ours in its phraseology, requiring the defendant to "*appear before the justice in court.*" Nothing is said in relation to his appearing by attorney; yet the courts have repeatedly held, that the defendant might appear in person or by attorney. 15 John.

409

Rep., 476; *Martin v. Moss*, 6 John. Rep., 126; *Tinney v. Filer*, 8 Wen. Rep., 596. This precise question was not raised in all of these cases, but the court in their decisions recognize the right to appear by attorney, in all of them.

We should not have hesitated to so hold, without reference to those authorities, and should not have taken time to examine the question, had we not been credibly informed that the supreme court, on the circuit, had held differently. Believing, however, that we are right in our views on this subject, we shall so hold until overruled by the supreme court, by a decision which will be considered as binding on us. Allowing that the defendant has a right to appear by attorney, had Smith, by virtue of the power contained in the note, proper authority for that purpose? Although it does not appear, but that he might have had some other authority, yet the natural presumption is, that he had not. This power of allowing, authorized neither Smith nor any one in particular to appear, but is general, authorizing any person. This being so general and indefinite, it is claimed it should be considered as void. A party has the common law right to select his own agent or authority without restriction. Cognovits, to confess judgments in courts of recourse, are generally addressed to any *attorney at law* to appear and file pleadings under the rules of the court. Were it not for this, the defendant might authorize any physician, citizen of a town, any one of a class or place, to appear before him, as well as any attorney. The validity of such cognovits we have never questioned, and can see no good reason why they should not be sustained. There can no great evil result from sustaining judgments of justices entered upon similar cases. Those who give them, of course, are presumed to understand their nature and object. They give them with the understanding that, if not paid, judgment is to be entered on them. This is a part of their contract—a contract they have
410 a right to make. They can limit or extend the power to appear, to whom they please, and before whom.

If the plaintiff be guilty of any wrong, fraud or deception, in procuring the judgment, a court of equity would relieve against it. So also in case the original note was obtained by fraud or mistake. We do not therefore think, as has been urged by counsel, that public policy requires us to hold such powers void; but, on the contrary, feeling it to be our duty to sustain and enforce the contracts of parties, honestly and fairly made, unless they contravene some public law, or are contrary to good morals, we feel bound to enforce such, as the one before us. The judgment is therefore, affirmed.

OHIO BANKING LAW.

[Court of Common Pleas, Seneca County, Ohio, April Term, 1850.]

SYLVANUS ARNOLD, for use of the Seneca County Bank, v. RUFUS W. REID.

[FROM THE SENECA ADVERTISER.]

Banks—Construction of the Ohio banking law, as to loans to directors—Such loans void, if made without, or in opposition to by-Laws.

This was an action of assumpsit upon a promissory note, dated August 31, 1848, payable to the order of S. Arnold, cashier, nine months after date, for two thousand dollars, and signed by Reid, as principal, and Cronise, Coonrod and Green, as sureties. The note was not indorsed, but was discounted by the Seneca County Bank, and the proceeds paid to Reid. At the date of the note, the bank had no by-laws, regulating discounts to directors, nor upon the subject of the liability of directors to the bank. Reid was, at the discount of the note, one of the directors of the bank, and so continued to the 1st of January, 1849. Arnold, the plaintiff, is cashier.

The foregoing facts were found by the jury, who returned a special verdict incorporating them in it; and if the court should be of opinion, upon this finding, that the plaintiff is entitled to a verdict, they assess his damages at \$——; and, if not, they find for the defendants.

The Seneca County Bank is one of the "independent banks" of this state.

Watson, for the defendant, cited the following portions of the "act to incorporate the state bank of Ohio, and other banking companies:" 411

SECTION 44. "The stockholders, collectively, of any independent banking company, shall, at no time, be liable to such company, either as principal debtors or sureties, or both, to an amount greater than three-fifths of the amount of capital stock actually paid in, and remaining undiminished by losses, or otherwise; *nor shall the directors be so liable, except to such amount, and in such manner, as shall be prescribed by the by-laws of such company, adopted by its stockholders, to regulate such liabilities.*"

SECTION 64. "All notes, bills, and other evidences of debt, excepting bills of exchange, discounted by any banking company, shall be made, by the terms thereof, or by special indorsement, payable solely to such company."

1. He maintained, in argument, that the note was in violation of the forty-fourth section, because there was no by-law, at the time the bank accepted the note from Reid, regulating the liability of directors.

2. He insisted that the note was void, because it was not made payable to the bank, either in terms or by special indorsement.

Pennington and *Gibson*, for plaintiff, in reply, cited section sixty-six of the same act, as follows:

"If the directors of any banking company, which shall have availed itself of the privileges granted by this act, shall knowingly violate, or permit any of the officers, agents, or servants of such company to violate, any of the provisions of this act, all the rights, privileges, and franchises of said company, derived from this act, shall thereby be for-

feited: such violation shall, however, be determined and adjudged by a court of competent jurisdiction, agreeably to the laws of this state, and the practice of such court, before the corporation shall be declared dissolved; and, in case of such violation, every director who participated in, or assented to, the same, shall be held liable in his personal and individual capacity for all damages which the company, its shareholders, or any other persons, body politic or corporate, shall have sustained in consequence of such violation."

The plaintiff's counsel argued that, if the discount of Reid's note by the bank was contrary to the charter, this section gives a *penalty* for the breach of duty, but that the note remains binding upon the parties to it, and may be collected by suit.

BY THE COURT—BOWEN, PRESIDENT JUDGE.

412 No construction of these several sections, or any of them, has been made by the courts. The forty-fourth section seems to prohibit directors from becoming indebted to the bank, either as principals or sureties, except in pursuance of some by-law which the stockholders may adopt to regulate any liability of theirs, which they may wish to incur, compatible with the charter. In this respect they are placed under disability, on account of their relation to the bank. The reason therefor is supposed to be the prevention of improvident loans to themselves—to secure the disinterested and faithful performance of their duties in every thing appertaining to the making of loans. It was an evil much complained of under the former banking system, that the *directors* employed a large part of the funds of banks under their control in their own business, or in speculations, to the detriment of the institution and of *bona fide* borrowers of bank capital, who were seeking to employ it in conducting the real business of the country. Reid was a director at the time he borrowed the two thousand dollars, for the recovery of which this suit is brought. He and his associate directors consented to this loan, and accepted his note in the absence of any by-law of the bank on the subject. This was a violation of his and their duty, and for which he and they, who participated in, or assented to, the making of the loan, are liable in their personal and individual capacities for all "damages which the company, its shareholders, or any other persons, body politic or corporate, shall have sustained in consequence of such violation." But is the note *void*, for being taken by the corporation, without any law conferring the power to take it, and when its reception by the bank, as evidence of liability by its makers, is forbidden?

This presents fairly the proposition before us for decision. The forty-fourth section declares that the directors shall *not be liable* to the bank, either as principals or sureties, *except* to such amount, and in such manner, as shall be prescribed by its by-laws, adopted by its stockholders, to regulate their liabilities. No by-law on the subject was enacted. It may be presumed that none was designed by the stockholders to be enacted; it may have been, for aught that is shown in the case, their decision that the *directors* should never become debtors of the bank. If so, no by-law relating to them was needed. It could only be by virtue of some by-laws, when in force, that such indebtedness could accrue.

413 Authority is given by the charter to the stockholders, to invest the directors with power to borrow money in their own behalfs of the bank, or to become the sureties of others for that purpose, in such

amount, and under such restriction, as they may impose. Till such authority is given by the *direct act* of the stockholders, the acceptance of the office of director disqualifies the incumbent, during his continuance in office, from rendering himself liable by signing a note, or bill, for discount at the bank. The action of the board of directors in loaning money to a codirector, in the *absence* of any by-law, makes no better case for the bank than if the act of loaning was expressly *prohibited* by one. In either instance the charter would be violated by such a loan. It is the fault of the bank to accept the names of those as promisors, who, the charter asserts, shall not be bound by their signatures. It well accords with public policy to divest bank directors of the power of making discounts and loans to themselves. A provision so wholesome as that should not be treated as a nullity by the courts. No better clause—none better calculated to secure the faithful management of bank affairs—was ever inserted in a bank charter.

The stockholders did not see proper, in this instance, to *license* the directors to become bound as borrowers of the bank. They did, however, without any permission, loan to Reid, an associate director, two thousand dollars, and Coonrod, Cronise, and Green signed the note as securities. Default has been made in the payment of it; and the bank comes into this court, and, upon this state of facts, asks a judgment for the amount of a debt which it had no authority to contract in the manner they adopted. True, Reid has received the money, and, if not paid, the stockholders must lose the amount of it; and true it is, the debt was made without fault of theirs, and there is no doubt but that the sureties believed themselves liable when they signed Reid's note; but we must come, at last, to the point, whether the bank can recover upon a contract *forbidden* by its charter. Can the courts give any validity to such instruments? The doctrine is well settled, that corporations are creatures of the law, and derive all of their powers and capacities from the law of their creation. They are considered as having such powers as are specifically granted by the act incorporating them, or as are necessary for the purpose of carrying into effect the powers expressly granted, and as not having any other. (2 Kent's Com., 298.)

When Reid, being a director of the bank, gave his note to the cashier for money which he borrowed from it, he committed an unauthorized act. He, and those acting with him, did that which was *expressly* forbidden by the charter. An *illegal* contract was there by brought into life, and is now sought to be enforced—to have imparted to it, by this court, *legality*. It is asked to have it set up as a thing of binding efficacy—as an obligation containing the elements of justice, as against the makers of it, and entitled to the aid of the law. We are impelled by duty, and the law governing the case, to say we can give no aid to the enforcement of the contract. It can have no effect as an agreement, but must be treated as a nullity. Those who are injured must look to their remedy against the directors who perpetrated the mischief. (See *Levitt v. Blachford et al.*, court of appeals, N. Y., Jan. 1850. 2 Law Mag., 116).

The next point is, that the note is made payable to Arnold, and is not endorsed. What was intended by the framers of this charter, in giving this section a prominence in it, was to prevent any fraudulent transfer of the notes and bills of the bank. This suit is in the name of Arnold, who sues for the use of the bank. This is clearly against the sixty-fourth section, and this suit cannot be maintained. It is a direct departure from its charter. This does not, however, make the note void. It might yet

be transferred to the bank by Arnold, and a suit sustained upon it. But, as the other objection is fatal to a recovery, it will be of no avail to the plaintiff to amend, or become nonsuit, as he might do, if there was no objection but this, and proceed in the name of the bank. Judgment for defendant.

506

JUDGES OF ELECTION.

[Ottawa Common Pleas, May Term, 1850.]

SERGEANT N. WILCOX v. JAMES H. MAGRUDER.

[Reported by S. N. WILCOX.]

Election—How many judges necessary—Qualifications.

This case was submitted to the court upon the following agreed facts, to wit:

1. That at the annual election held October 9th, A. D. 1849, in Ottawa county, the parties in this case were opposing candidates for the office of prosecuting attorney—that at said election, one Alfred Pierson was a legal trustee of Carroll township, in said county, and was, at the same election, supported by the Democrats for, and elected to, the office of county commissioner.

2. That said Pierson—the electors present, at the time and place of holding said election, failing to choose a person to sit as one of the judges of said election in his place—sat as one of the judges of said election, assisted in receiving and counting the votes, and returned the pollbook to the clerk's office as said judge.

It was agreed, also, that Pierson would be elected county commissioner, if the votes of said Carroll township were not counted, and in that case said Wilcox would be elected prosecuting attorney. The principal errors assigned were—

1. That the justices and deputy clerk erred in receiving the pollbook from Carroll township, as a legal pollbook, and counting the votes therein; because it was not returned to the clerk's office by a legal judge of said election.

2. That said pollbook was illegal and void, because the election in said township was held before only two legal judges, when the law requires three.

506 *J. L. Greene, Esq.*, for the contestor, contended that Swan's Statutes, pages 950 and 957, required *three* trustees to be elected in each township; and when the election law, Swan's Stat., page 306, section 6, required the *trustees* of the several townships to serve as judges in all elections under that act, it meant *all three* of the trustees, not two of them. Section 7, same page, says, "That, if *either* of the trustees, etc., shall fail to attend at the time and place of holding elections, or if *either* of them *should be a candidate*, then it *shall be the duty* of the electors present to choose, *viva voce*, suitable persons (as the case may require), having the qualifications of electors, *to act as judges*, or clerk (as the case may be), of the election; and previous to any votes being received, each judge and clerk, not being a trustee or clerk of the township, shall take an oath or affirmation," etc. That the judges of elections were created, governed, and qualified solely by statute law, and they had

no powers, duties, or qualifications except those expressly conferred upon them by statute. That when the law said, "If either of them (the trustees) be absent, or a *candidate*, others should be chosen to act as judges in their places," etc., it meant that, if *one* trustee was a candidate, his place should be supplied, if *two* were candidates, or absent, their places should be supplied, and the person or persons thus chosen, sworn or affirmed as the law directs, previous to any votes being received. That "either" meant *one* or the *other*, or *one*, or more than one. If there were two vacancies, by reason of the absence of two trustees, or their being candidates, and their places not filled according to this act, no one would pretend that the remaining one could legally receive votes as a board of election; and yet the act as plainly and positively requires the vacancy of *one* to be filled, as it does those of two; for it directs both vacancies to be supplied in precisely the same words. Nor does it declare the consequences of a neglect, or omission, in the one case, different from those in the other. If a candidate was permitted to sit as a judge of an election when he is such a candidate, he was a judge in his own case; being personally interested in the result, and that interest was communicated to, and felt by, every candidate at that election. If the interested judge was a democrat, every democratic vote he could get in by his decisions or his qualifications, was one vote gained, not only for himself, but for every democratic candidate on the ticket with him. So, if he could exclude a whig vote not only he, but all the other democratic candidates, gained in the same proportion, and all the whigs lost in the same ratio; and *vice versa*. When the trustees come together at the time and place 507 of holding election, no one doubts but that the electors present *might* have chosen one of their number to act as a judge of that election in place of Pierson. If they had done their duty, and filled the vacancy with a disinterested elector, could Pierson have acted as a judge, too? Could he have returned the pollbooks as one of the judges? If he had, would that pollbook have been legally returned, so as to require the clerks and justices to receive it as such? Now, if he could not have sat as one of the judges of that election, and could not, as a judge, have returned the pollbook, *had the electors present done their duty*, and filled the vacancy, could he legally do either, merely because the electors *failed to do their duty*? Did the mere *omission* of this duty, on the part of the electors, confer any rights, powers or qualifications upon Mr. Pierson, which he would not otherwise have had? Swan's Stat., page 310, section 24, says, "In making the abstract of votes aforesaid, the justices and clerk shall not decide on the *validity* of the returns aforesaid, but shall be governed by the *number* of votes stated in the pollbooks; but no paper shall be received as a pollbook of any township, unless delivered at the clerk's office by one of the judges of the election held in said township."

B. J. Bartlett, Esq., for contestee, contended that, in cases of public officers, a majority could always act, and the votes having been received by two legal judges, a majority, they were legal votes.

SADLER, president judge, held that Pierson being a candidate, disqualified him to sit as a judge of that election; but that the other two judges being a majority of them, could legally receive the votes, and that the subsequent returning of the pollbook by Pierson would only invalidate that, and not the votes cast; if he should hold the pollbook illegal, he would permit the contestee to go back, and show that he re-

ceived a majority of the votes legally given; and he therefore, held that the present incumbent ought not to be ousted.

The fourteenth section of Swan's Statutes, page 307, reads as follows, to wit: "That after the poll books are signed, in the manner hereinafter contained, in the form of the pollbooks, the ballot boxes shall be opened, and the tickets or ballots therein contained shall be taken out one at a time by *one* of the judges, who shall read distinctly, while the ticket remains in his hands, the name or names contained therein, and 508 then deliver it to the *second* judge, who shall examine the same, and pass it to the *third* judge, who shall string it on a thread, and carefully preserve the same," etc. It is difficult to perceive how *two* judges of the election can fulfill the requirements of this section.

581

MORTGAGOR APPOINTED EXECUTOR.

[Supreme Court of Ohio, May Term, 1850.]

MITCHELL, ADM'R DE BONIS NON, v. TOWNER.

Chancery—Foreclosure of mortgage—Executor.

Towner gave Mitchell, in his lifetime, a mortgage on land for the sum of \$800. Mitchell soon after died, and in his will appoints Towner executor of his estate. Towner accepts the appointment, and, in a year or two, resigns his office of executor. The plaintiff is then appointed administrator, etc., of Mitchell's estate, and finds among the papers that came into his possession, the mortgage, the foreclosure of which is here sought. The defendant sets up in his answer, that, as he had been appointed executor by the mortgage, this mortgage was hereby extinguished.

BY THE COURT. This court has often decided that the old English common law doctrine or rule, that the appointment of a debtor executor, 582 extinguishes the debts due the estate from the executor, is not in force in Ohio. That doctrine is now exploded. Decree for the amount due on the mortgage, with the statutory penalty. 1 Monthly Leg. Ex., 43.

64

JUROR—CHALLENGE OF.

[Montgomery Supreme Court, June Term, 1850.]

Before Justices Avery and Caldwell.

LOWE v. MCCORKLE.

A party discovering the incompetency of a juror, after he is sworn, and making no objection before the verdict is rendered, is considered to have waived his right to challenge that juror for cause.

This case was tried twice in the Montgomery common pleas. On the second trial, the defendant's counsel inquired of the jurors, before they were sworn, if any of them had been jurors on the first trial. No

one replying in the affirmative, no challenges were made. After the testimony had closed, the clerk of the court, upon comparing the names of the jurors on the trial, found that A. B. had served upon the first jury, and was now upon the second. The fact was communicated to the defendant's counsel, before the jury retired; but they made no objection. The jury found for the plaintiff. The fact of the juror having been on both juries was urged, on motion for a new trial. The juror made affidavit that he had entirely forgotten that he had served on the former trial, and the court gave judgment on the verdict. This was assigned for error.

Crane and Davis, for the plaintiff.

Haynes and Howard, for the defendant.

The court held that the defendant, having discovered the incompetency of the juror before the verdict was rendered, and making no objections then, must be considered as having waived his right to challenge that juror for cause.

Judgment affirmed.

HOMICIDE IN SELF DEFENCE.

145

[Court of Common Pleas, Hamilton County, Ohio, July Term, 1850.]

THE STATE OF OHIO v. JOHN C. WALKER—INDICTMENT FOR MURDER.

Homicide—Murder—Self-defense—Carrying weapons—Rights and duties of officers.

The prisoner came from Indiana to Cincinnati to receive medical treatment for a disease in his eyes. He had been here about six months, when his sight was so far restored that he was permitted to visit the circus in company with friends. There was a great crowd, and he left his friends, who were seated, to be nearer the ring. He was standing, with many others, observing the performance, but making no disturbance when a call was made to stand back; Dalzell, a constable, employed to keep order, came in front, and ordered all to stand back. He says he gave the order twice, and Walker did not regard it; he thereupon seized him by the collar with both hands, and pushed him back, with considerable violence, some ten feet, when two feet would have been sufficient to prevent the obstruction of any one's view. He did not announce himself as an officer, and wore no badge. While pushing Walker back, he shook him roughly, being a much stronger man. Walker remonstrated, and put his hand to his bosom. Dalzell, seeing this, threatened to kill him if he drew a knife, and, with a violent blow of his fist upon Walker's face, knocked him down, and fell upon him, holding him there. At this moment, Davidson, another constable, came up with an uplifted cane, and seized upon Walker, without announcing his official character or purpose. In his dying declaration, he said he rushed in to save him. While both the officers thus had hold of Walker, he drew a bowie-knife, and gave each of them one stab, which to Davidson proved fatal. Davidson struck him with a cane on his head, but whether immediately before or after the stab is doubtful. The whole affair did not occupy three minutes. Walker retreated the mo-

146

ment he got loose, and called for an officer, to whom he gave up his knife. This knife was the gift of a friend, when he contemplated enlisting for the Mexican war. He had not used it before, and was never known to have been in any quarrel. When leaving home to come to Cincinnati, his brother-in-law advised him to take the knife with him and carry it if he should ever go out at night. He was about twenty-two years of age, never robust, and then very delicate, in consequence of the regimen to which he had been subjected. He had always been of a remarkably amiable and gentle disposition.

The prosecution was conducted by *A. G. W. Carter*, prosecuting attorney, and *Thomas Powell*, assistant.

T. Walker, W. Y. Gholson, J. L. Scott, and A. S. Sullivan, conducted the defense.

The jury, after a few moments, rendered a verdict of acquittal.

The charge to the jury, by WARDEN, P. J., was as follows:

Gentlemen of the Jury: Impressed by the importance of the cause, and the nicety of some of the legal questions involved in this trial, I have, as far as possible, reduced to writing what we have to give you in charge.

Did the defendant, John C. Walker, *unlawfully* kill Peter Davidson? If unlawfully, did he *purposely* kill? If purposely, was his act *malicious*? Or was the act, though unlawful, free from malice? Or, lastly, was the high responsibility of taking life assumed for the *protection of another life*, and in vindication of the natural law of self-defense?

Such are the grave and solemn issues you have sworn well and truly to try between the STATE and the DEFENDANT: *well*, by carefully, earnestly, diligently, faithfully ascertaining the facts, so as to make a history of them such as you can hold up to the inspection of your reason in the light of your conscience; *truly*, in rendering that verdict which the law itself would render, could it manifest its will without the aid of human ministry.

Selected by the court, and accepted by both parties to this important controversy, of your meeting these high responsibilities in the spirit and the disposition they require, the court can not entertain a doubt.

147 In regard to the first point of your inquiry, it is admitted that the physical means whereby Davidson came to his death are truly stated in the indictment.

But, if the defendant did this killing, was it of *purpose*? Was there a design to kill? The intent to kill is said in the books to be "conclusively inferred from the deliberate use of a deadly weapon." And it cannot be denied that, from the *deliberate* use of an instrument calculated to produce death, an inference of a deadly design may, in all proper cases, be drawn with sufficient legal certainty. But, in order to infer so much from the mere *use* of such a weapon you must remember, it is necessary that you should find that it was *deliberately* used and *in a deadly manner*; for, under our statutes for stabbing, as well as from the records of crime, it abundantly appears that a deadly weapon *may* be deliberately and *maliciously* used with an intent to *wound*, and not to kill.

The design to kill need not be a premeditated design; but the killing must be the fruit of a *formed* design to do mischief—hastily formed, or formed upon the moment—not deliberated, not premeditated.

This "formed design," or disposition to do mischief, is one of the definitions of *malice*, and to an intelligent mind, not the least expressive. But there have been many definitions, some of which are more or less

satisfactory according to the circumstances of their application. Malice is "the dictate of a wicked, depraved, and malignant heart, regardless of social duty, and deliberately bent on mischief." It is implied by law from any deliberate, cruel act, however sudden, such as a killing without legal provocation or excuse; for the heart that nerves a hand uplifted against the life of another, who has not offended, must be a heart abandoned of love, of mercy, of justice, of *humanity*—the abode of malice. And, where the act shows such a disposition of mind as puts the actor at enmity with society and in defiance of law, or as shows him reckless of the dictates of humanity and duty, though the particular individual injured may not be especially the object of animosity or malevolence, still the act is, *as against that individual*, malicious; for *he* is included in the *general* enmity of the actor. It follows that malice is different from hatred, passion, or anger—*different* from each, but not *inconsistent* with either. For each of these may, as it were, be the *instruments* of malice, and it may coexist with them. On a former occasion, I ventured to apply to malice an idea derived from an illustration, by a very fine writer, of the consistency of reason with passion, wherein he described the efforts of a celebrated orator as the manifestations of "reason, penetrated and, as it were, made *red hot* with passion." There is a reasoning in crime—it deliberates, calculates; and the evil faculty thus exercised may, like the higher and purer reason, be generated with anger, and made red hot with passion. It may glow, it may burn, it may *consume*. Where *it* is wanting, and you have nothing but the glow or flame of *anger*, there malice also is wanting, and you witness the simple *machinery* of our nature called into hasty and too violent action. In fine, to use a definition given by one of the counsel in this cause (who also enjoys the distinction of having given to the public a valuable treatise on law), malice "means that 148 dark, sullen, malevolent disposition of the mind, which, in the prosecution of its mischievous purposes, is equally reckless of divine and human law." Walker's Introduction, 441. Such is its *essence*; its circumstances are as various as the changes of imagination itself.

We may add, though we think it unnecessary, the definition given in one of the instructions requested:

"Malice is the dictate of a wicked, depraved, and malignant heart. It is evidenced by any act which springs from a wicked and corrupt nature, attended by circumstances indicating a heart regardless of social duty, and bent on mischief." But malice does not mean anger. On the contrary, the sudden explosion of anger, under great provocation, rebuts the presumption of malice, which is essentially cool and deliberate. In the present case, the jury may consider malice to be a wicked intention to kill. *The State of Ohio v. Turner*, Wright's Rep., 27.

We have, perhaps, sufficiently elucidated the nature of malice. The *mode of proving* it remains to be considered. This proof is usually derived, like that of purpose, from a consideration of the weapon used, and from the want of legal provocation. So as to *preparation* of such an instrument. But here we are asked to charge that, "in this state, every man has a constitutional right to carry weapons for self-defense; and hence there is no presumption of malice from the carrying of a weapon such as this knife, especially when the circumstances of procuring and carrying it show that it was only for self defense." And we unhesitatingly give the instruction. This state has done well in securing to each citizen such a right; and, whatever reforms may

149 be projected, that will be a dangerous hour in which it is taken away. Unless connected with *other testimony*, this evidence affords no presumption of malice whatever. Sometimes the proof of malice consists in circumstances directly manifesting the qualities of mind and heart, to which, we have alluded, as to be recognized as the very embodiment of malice itself. Declarations and expressions of the prisoner, recently, before, and soon after the fact, are competent evidence on this subject. But these are to be carefully scrutinized, belonging, as they do, to "the weakest and most suspicious class of testimony." There is always danger that words may have been imperfectly heard, dimly and partially remembered, inaccurately repeated, and understood by the jury in a sense different from that intended. Different language from that of the defendant may be substituted by the witness, whose emphasis and intonation, also, may be intentionally, ignorantly or accidentally different from the emphasis or intonation of the defendant.

But, on the part of the defendant, it is claimed that he was acting, not from malice, but upon the principles of self defense—a principle as sacred as that, which protected the life of Davidson himself—the great ultimate right of nations—the great natural, unsundered, and inalienable right of every man in society. What is this right? Is it a right to avenge insults or redress wrongs? Is it a right to take life upon mere supposition, fancy, or conjecture? Or, on the contrary, is it a humane recognition of the *instinct of life* and the infirmity of man's mind? Again: must the right be restricted to the measure of *actual* danger, or to that of the *apparent* danger, as it would be apprehended by a reasonable man under the same circumstances—allowing, of course, for excitement or passion naturally excited? On this subject, we can not do better than charge you in the language of the instructions asked:

"If one man strikes another a blow, that other has a right to defend himself, and to strike a blow in his defense; but he has no right to revenge himself; and if, when all the danger is past, he strikes a blow not necessary for his defense, he commits an assault and a battery." *Regina v. Driscoll*, 41 E. C. L., 120, 1 Carr and Marsh., 214; per COLERIDGE, J.

150 "A man who, in the lawful pursuit of his business, is attacked by another, under circumstance which denote an intention to take away his life, or to do him some enormous bodily harm, may lawfully kill the assailant, provided he use all the means in his power otherwise to save his own life, or to prevent the intended harm, such as retreating as far as he can, or disabling his adversary without killing him, if it be in his power. But when the attack upon him is so sudden, fierce and violent, that a retreat would not diminish, but increase his danger, he may instantly kill his adversary without retreating at all. And when, from the nature of the attack, there is reasonable ground to believe there is a design to destroy his life, or commit any felony upon his person, the killing the assailant will be excusable homicide, although it should afterward appear that no felony was intended." Selfridge's Trial, page 160; per PARKER, C. J.

The doctrine of the celebrated case of Selfridge, just read, has been much discussed, and is now with slight objections, settled as the law of the land, as it is the law of humanity and right reason. The application of it to the *case* of Selfridge appears to this court to have been improperly made by that jury; and we must regard the example of that case as having been most pernicious, in a community like ours, already too prone to the encouragement of an exaggerated sense of personal rights.

Its *doctrine* is the law, however, and you must apply it to this case, if the facts warrant the application.

In support of this claim of self-defense, it is insisted that the defendant was violently assaulted by Alexander Dalzell, and that Peter Davidson received his death wound in real or apparent combination and participation in that assault. It is replied, on the part of the state, that the said persons were constables in the due execution of their office, making a lawful arrest.

Here a question of law arises for our determination, which is more important than difficult. These men, it is said, were public officers. And in an improved work we have a statement that ministers of justice, as bailiffs, constables, watchmen, etc., while in the execution of their offices, are under the peculiar protection of the law—a protection founded in wisdom and equity, and in every principle of political equity; for without it the public tranquility cannot possibly be maintained, or private property secured, nor, in the ordinary course of things, will offenders of any kind be amenable to justice. For these reasons, the killing of officers so employed has been deemed murder of malice pre-pense, as being an outrage wilfully committed in defiance of the justice of the kingdom 1 Russ., 532. This *protection*, undoubtedly, ought to be given; and liberal presumptions have ever been extended to the conduct of the public servants. But we do not regard the killing of an officer as malicious, simply because he was an officer in the due execution of his office; there might be an entire absence of malice in such a killing. On the other hand, notwithstanding what we consider the too broad language of some of the authorities, we are well satisfied that the mere illegality of an arrest is not sufficient to reduce the crime of killing from murder to manslaughter. We look upon an unauthorized arrest as an assault or false imprisonment, more or less aggravated, according to the circumstances of the case; and except as to the measure of resistance, which may become necessary from the *official character* of the assailant, we deem that official character unimportant in ascertaining the nature of the crime. 151

As constables, these men were conservators of the peace. Their power to arrest depends upon a *breach* of the peace, or such preparations therefor as are contemplated by the statutes against riot, which breach or preparations occur in his view; or, it must be derived from warrant. Was Walker committing a breach of the peace? Or had these officers a warrant to arrest him? If he was liable to be arrested, was the proper degree of force exceeded? If so, the officers in their turn became the assailants, and might be resisted as other assailants. It is important to ascertain whether they were properly present. I have always considered that any one who is, *ex officio*, a conservator of the peace, has, *ex officio*, a right of visiting all licensed places of public amusement—it being more important to *prevent* breaches of the peace than to punish those who have already committed them. It is said Dalzell and Davidson were employed, or one of them was, by the managers of the circus. As *officers*, they *could not* be so employed. It was as individuals they acted, unless the contingency should arise when their public functions should be called into exercise. We give, on this subject, and with entire approbation, all but one of the instructions asked. We charge you:

1. That a constable or police officer attending at, or employed in, a circus or place of public amusement, has no greater or other power than

he would have, and is bound to discharge his duties in the same manner, that he would be, in any other place.

152 2. That a constable or police officer employed to keep order at a circus or place of public amusement does not, while acting in the discharge of the duties of such employment, possess any other or greater rights than a private individual, who might be so employed, in enforcing any rules or regulations provided for the conduct of the visitors or audience.

3. That where any person, visiting a circus or place of amusement, violates any rule provided, as before stated, or is guilty of any disturbance or disorder, not amounting to a breach of the peace, such violation, disturbance or disorder, will not justify the arrest of such person, or any assault or attack upon him. The violation, disturbance, or disorder may be of such a character as to justify the expulsion of such person, but the proprietor of such circus, or place of amusement, or those in his employment, before assaulting, in any manner, the body of such person, must *first require* him to leave, and then, on *his refusal*, can only use such force as may be *necessary* to remove him from the place or house.

All of which, after all, may be expressed in a single sentence: Justice accepts no man's hire—goes into no man's livery. Conservators of the peace belong to the whole public, not to a faction, or to any single man. Hence, a public officer cannot arrest at the command, or by the virtue of the employment, of any private citizen, but is restricted to the general law. Otherwise, the owner of a railroad, or a steamboat, or a hotel, or a circus, may legislate, and enforce their own laws by officers peculiarly in their own interest. If one misbehave at a tavern, he may be requested to leave, and, if he refuse, sufficient force may be applied to remove him. If he resist that force, he breaks the peace; if he break the peace, a conservator of the peace may lawfully arrest him on actual view. But the request to leave is the first and indispensable requisite.

We are asked further to charge "that it is the duty of any officer, or other person who interferes in an encounter between two individuals, to *give notice*, in some manner, of his character or intention in so interfering. If, in so interfering without notice, he receives an injury or blow from the party not in the wrong in such encounter, such party having no knowledge of his character or intention, there is no greater responsibility on such party for such injury, or blow, than there would be, had the same been inflicted on the other party to the encounter." Though the latter clause of this charge may, perhaps, sufficiently explain the former, we cannot charge you in the very words asked. No notice need be *given*, if 153 the circumstances show that the party *knew* the character or intention of the person interfering.

We would not be understood as adopting the doctrine of the authorities cited as applicable to public meetings. There is an important distinction between public meetings in England and assemblies of the people in this country. The right to assemble, to deliberate, and to resolve, is a fundamental right; and I am not prepared to say that he who wantonly disturbs a public meeting may not instantly be arrested as a disturber of the peace. But it is different with a circus, or other place of amusement; and we fully recognize the doctrine so applied.

MORTGAGE.

256

[Pickaway, Ohio, Supreme Court, November Term, 1850.]

Before Justices Spalding and Avery.

[Reported by H. F. PAGE.]

CROUSE V. CALDWELL ET AL.

Where the vendee of an estate contracted, in the instrument of purchase, to extinguish a mortgage upon the premises, *Held*, that he could not, after payment made by him, set the mortgage up against another incumbrancer.

The complainant alleged, in his bill, that he recovered a judgment, in the common pleas of Pickaway county, on the 8th of June, 1846, against one Nathan Hallowell and others. That a levy was made upon one hundred and seven acres of land, owned in fee, by Hallowell, before a year from the rendition of the judgment had expired. That there was a mortgage upon the premises, made by Hallowell to one Anderson, and filed, for record, on the 3d of February, 1845. That, after the recovery of the judgment and before the levy was made, Hallowell conveyed the land in dispute to Caldwell, receiving in exchange another tract of land. That Hallowell also gave Caldwell some personal property as a part of the consideration moving from him, and that Caldwell also agreed, in the contract of purchase, to pay to Anderson the amount then due from Hallowell, upon the mortgage. That Caldwell accordingly had paid this mortgage debt in pursuance of his agreement, but, after such payment, had assigned it to some person to the complainant unknown, under pretense that it was not extinguished, and with the intention of embarrassing the complainant in the collection of his debt. That it was kept on foot, with a fraudulent intent, when, in fact, it had been extinguished by Caldwell, in pursuance of his agreement, and had no existence for any purpose whatever. The complainant prayed that the said fraudulent incumbrance might be removed by the court, and the premises sold for the satisfaction of his judgment; also, for general relief.

The defendant, Caldwell, in his answers, admitted all the allegations of the bill, except the charge of fraud, but insisted that he had a right to consider the mortgage as not merged, and might set it up to protect himself against the judgment. He also alleged that he had no knowledge of the existence of the judgment at the time of his purchase, and that the land in question was not sufficient in value to pay both the mortgage debt and judgment. No replication was filed.

Henry F. Page, for the complainant, argued that if a vendor paid an incumbrance with his own money, it was clear that the vendee could not set it up against any other incumbrancer. It was equally clear that if the vendor left a part of the purchase-money in the hands of his vendee, for the purpose of paying an incumbrance, it was equivalent to a payment by the vendor himself. At the time of the purchase, and by the same contract, Caldwell agreed to pay the mortgage. If the mortgage had not existed, Hallowell would have received the same amount from his vendee in money: because this sum, in the estimation of the parties, was necessary to make a fair consideration upon the part of the vendee. The transaction, therefore, was, in all respects, the same as if Hallowell had received the amount of the mortgage debt from his vendee, and then ex-

258 tinguished the mortgage therewith, or with any other money. It was immaterial that Caldwell himself paid the money to Anderson. This arrangement might have been adopted from convenience, or because the vendee was unwilling to trust Hallowell with the possession of this money. That the payment, by Caldwell, was equivalent to a payment by Hallowell, and in all respects the same, might be seen by one consideration. Could Caldwell, after payment of the mortgage debt, recover the amount of Hallowell? Most surely not, and the reason is evident. If the purchaser of an estate discovers that there is an incumbrance on it, he may pay the same, and claim the amount of his vendor, or set it up against other incumbrances to protect his title. But this principle has no application to this case. At the time of the purchase, Caldwell knew of the existence of the mortgage debt, and, in the contract, provided a mode by which it was to be extinguished. It was accordingly extinguished, not with Caldwell's money, but with Hallowell's money. Caldwell, therefore, stands in the same situation as if he had bought the land with no incumbrance upon it but the judgment. If he had bought the land with no incumbrance but the judgment, his purchase without knowledge would not relieve him from the incumbrance. The land would be bound by this lien, without regard to his knowledge or ignorance of its existence. It was his misfortune or fault to have purchased an estate without an examination of the title. The doctrine of merger, as administered in courts of equity, had no application to a case like the present. It was demonstrable, upon legal principles, that the land in question was liable to the payment of the complainant's judgment, and that the mortgage had no legal existence for any purpose whatever.

The court granted the prayer of the bill.

267

CONTRACTS—CONSTITUTIONAL LAW.

[In the Montgomery, Ohio, Common Pleas.]

ANONYMOUS.

A creditor who voluntarily makes himself a party to the proceedings under an insolvent law of another state, in which his debtor resides, which proceedings, by that law, discharge the contract, will be deemed to have abandoned his extra-territorial immunity, and will be bound by the discharge.

The constitutional prohibition upon the states from passing laws impairing the obligation of contracts, does not extend to such a case, although the parties are citizens of different states.

Contracts may be dissolved according to the law of the place where they are made; or by any acts done, or contracts made subsequently in another county, by the parties, which acts or contracts, according to the laws of the latter county, are sufficient to work such a dissolution or extinguishment.

Assumpsit for goods sold and delivered. Plea, a discharge under the insolvent laws of New Jersey, which provide that with respect to the creditors who shall come in under the assignment and exhibit their demands to the assignee for a dividend, they should be wholly barred from having afterward any action or suit at law or equity against the debtor or his representatives, except in case of fraud; and that the plaintiffs did come in under the assignment, and exhibit their demands to the assignee for a dividend, and received seventy-five per cent. thereon,

being the dividend to which they were entitled. Replication that the plaintiffs, at the time the contract was made, were, and now are, 208 citizens of Pennsylvania; that the contract was made in that state, and that the seventy-five per cent. was not received as dividends, but as payments on account. General demurrer.

M. E. Curwen, in support of the demurrer. By the debtors' act of New Jersey, any debtor in embarrassed circumstances may assign all his property to assignees for the equal benefit of all his creditors, stating, under oath, their names, the amount of their claims, their residence, and the amount of the assets. Due notice having been given, creditors are allowed three months to investigate the accounts, and accept the terms of the assignment. The demands of the creditors are to be verified by the creditor's oath, taken before an officer in New Jersey; and, as against those who thus came in under the assignment, and exhibit their claims for a dividend, such a proceeding is a discharge of the debt. Those who do not choose to accept the terms of the assignment may proceed against the debtor's body, or seize any property not assigned, for the satisfaction of their claims, but are not entitled to any portion of the assets in the hands of the assignee. The plea sets out this law and a discharge under it; and the question raised by the demurrer is, whether a creditor who voluntarily makes himself a party to the proceedings under an insolvent law of another state, in which his debtor resides, which proceedings, by that law, discharge the contract, will be deemed to have abandoned his extra-territorial immunity, under the constitution of the United States, and be bound by the discharge. It is submitted that the constitutional prohibition upon the states from passing laws impairing the obligation of contracts, does not extend to such a case, although the parties are citizens of different states. 3 Story on the Const., page 256, § 1384; *Clay v. Smith*, 3 Peters's R., 411; *Pugh v. Bussell*, 2 Blackf., R. 394; *Woodhull v. Wager*, Baldwin's Cir., C. R., 301; 1 Kent's Comm., 422, note (c); 2 Kent's Comm., *393, sixth edition.

It is understood that the plaintiffs claim, by their replication, that this is a Pennsylvania contract, and therefore dissoluble only by the Pennsylvania law. But, if they do so, they overlook the very principle on which the rule is founded. The question here is, whether the contract has been dissolved. The *lex loci contractus* generally governs, because the parties are presumed to contract with reference to the laws of the place where they are. That presumption arises, in the absence of any express agreement, from the acts of the parties, indicative of such an understanding. If the contract 269 derives its whole obligatory force and effect from the laws of the place where it is made, upon the presumption that the parties contracted with reference to those laws, it is but following out the same principle to hold, that any act subsequently done, touching the same contract, by the parties, should have the same force and effect upon it, by virtue of the same presumption which the laws of that place, where it is done, attribute to it. Contracts are, it is true, dissoluble according to the laws of the country where they are made; but they are equally dissoluble and extinguishable by any other acts done, or contracts made subsequently in another country, by the parties, where those acts or contracts are, according to the laws of the latter country, sufficient to work such a dissolution or extinguishment. Story on Conflict of Laws, page 291, section 351c. This is what the plaintiffs admit they have done. They came in under an assignment made under the laws of New Jersey; they proved their claim

under oath *in that state*; exhibited their claim to the assignee *there*, and *there* accepted and receipted for the dividends falling to their share. This, by the laws of New Jersey, works an extinguishment and dissolution of the original contract; and it will have that effect in the courts of all other states, where those acts may be called in question.

Joseph H. Crane, contra. This case falls within the prohibition, in the constitution of the United States, upon the states, from passing laws impairing the obligation of contracts. He cited and commented on *Ogden v. Saunders*, 12 Wheaton's R., 358; *McMullan v. Neil*, 4 Wheat. R., 209; *Smith v. Parsons*, 1 Ohio R., 236; *Bank of Utica v. Card*, 7 Ohio R., ii, 170; *Sturgis v. Crowninshield*, 4 Wheat. R., 200. It does not appear in *Clay v. Smith*, that the contract was made out of the state in which the discharge was obtained; as it was in this case.

Curwen, in reply. I submit that neither the place where the contract was originally made, nor the question of the citizenship of the parties who made it, has anything to do with the present question, which is as to the *effect* to be given to certain acts done subsequently, by the parties, which the laws of that state, where they were done, say is a discharge of that original contract. Upon the principle already alluded to, I claim that the effect of such acts is universally determined by the *lex loci*. *Carnegie v. Morison*, 2 Metcalf's R., 381, 297, 8; *Bolger v. Boche*, 11 Pickering's R., 36; *Blanchard v. Russell*, 13 Mass. R., 1; 3 Met. R., 207; 3 Pick. R., 12; 10 Pick., 49; 2 Mass., 84, 90; 12 Eng. Com. Law R., 39; 26 *ibid*, 336; 29 *ibid*, 304; 41 *ibid*, 428; Story on Conflict of Laws, § 263; 2 Kent's Comm., 454; *Sherill v. Hopkins*, 1 Cowen's R., 103; *Watson v. Bourne*, 10 Mass. R., 337. If the courts of New Jersey would hold those acts to be a discharge of the original contract, the courts of all other states are bound to give them the same effect when brought into controversy before them. Undoubtedly such a discharge would have been good, had it been of a debt between citizens of the same state. *Smith v. Parsons*; *Bank of Utica v. Card*; *Ogden v. Saunders*; 3 Story on Const., § 1384, page 256. And as the Debtors' Act of New Jersey, makes no disposition of the debtor's estate, imposes no conditions upon creditors, which the debtor might not have lawfully made at common law, upon principles well known and long established before the constitution was adopted, it is not affected by the constitutional prohibition upon the states from *passing* laws impairing the obligation of contracts. *Owings v. Speed*, 5 Wheat. R., 420. At common law the debtor had a right to convey *all* his effects for the use of any particular creditors, and might stipulate as a condition of his preferring them, that they should accept the provision made for them, in full of all demands, and release him. *Hatch v. Smith*, 5 Mass. R., 42; *Lippencott v. Barker*, 2 Birney's R., 184; *Andrews v. Ludlow*, 5 Pick. R., 28; *Bradshaw v. West*, 7 Peters's U. S. R., 615; *Thomas v. Jenks*, 5 Rawle's R., 221, 1 American Leading Cases; Wallace's note to *Cumber v. Wane*, 1 Smith's Leading Cases, 258. The creditor, by accepting the terms of such an assignment, merges the old contract, and no technical release is necessary. Chitty on Contracts, 685b, 775a; 2 T. R., 24; *Knight v. Hunt*, 5 Bingham's R., 432; *Good v. Cheeseman*, 2 Barn. and Ad., 328; Forsyth on Composition, *passim*. The English courts adopt the principle, as to discharge, here contended for. *Phillips v. Allan*, 8 Barn. and Cress., 471.

The constitutionality of the law under which this discharge was had, has never been denied. To justify the annulling of it, the court must have *no doubt* that it is unconstitutional. *Merchants' and Mechanics*

Bank v. Smith, 6 Wheat. R., 135; *Dartmouth College v. Woodward*, 4 Wheat., 625; *Dawson v. Sherer*, 1 Blackf., 206. The plaintiffs having availed themselves of the provisions of this law, by coming in under it, can not now be heard to deny its binding effect. *Hansford v. Barbour*, 3 Marshall, 515; *Walker v. Tipton*, 3 Dana., 5.

Upon these grounds, I claim that the discharge is binding on the plaintiffs, and that the demurrer must be sustained. 271

Judge Crane was heard in reply.

The court took time to consider, and, on a subsequent day, sustained the demurrer, and the plaintiffs declining to amend, there was judgment for the defendant.

Messrs. Crane & Davies, for Plaintiffs.

Mr. Curwen, for Defendant.

STATUTE OF LIMITATIONS.

285

[In the Commercial Court of Cincinnati, January Term, 1851.]

DUX V. LOUIS.

If a promissory note be made in a foreign state, where the maker and payee reside, and is by its terms payable in another state, and suit is brought upon it in this state by an indorsee, the statute of limitations of the state where it is actually made, will, under the Ohio statute, be a good plea in bar.

Assumpsit upon a promissory note made by the defendant to Whalley & Coon, and by them indorsed in blank, dated at New Orleans, and made payable in New York. Plea, that the note was made in the state of Louisiana, at the time it bears date; that "the defendant and the parties to whom the note was made payable" resided there at that time, and that, by the laws of Louisiana, the claim is barred. General demurrer.

Mr. Curwen, in support of the demurrer. The rule of the common law is that the statute of limitations of the forum governs: Story on Conflict of Laws, § 577; *Bulger v. Roche*, 11 Pick., 36. The Ohio statutes have made an exception in favor of contracts made between persons resident without this state, at the time such contract was made, and which are barred by the laws of the state where such contract was made. They are to be governed by the limitation law of the place where the contract was made. Swan's Statutes, 555, § 4. But, in contemplation of law, this note, being made payable in New York, was made there, and it is submitted that the plea is bad in not traversing that allegation. The place of performance is *fictione juris* the *locus contractus*. Burge on Suretyship, 82. The plea not bringing this case within the exception, the case must be governed by the limitation of the forum. 286

Another objection is that the plea does not aver that the note was indorsed in Louisiana, and that the *plaintiff* resided there at the time the note was *indorsed* to him. The expression, "the parties to whom the note was made payable," is ambiguous; but, taken most strongly against the pleader, it must be held to mean the payees, Whalley & Coon. The indorsement is a new and substantial contract, and is presumed to be made at the *locus contractus*, which, in this case, was New York. 3 Rob.

Louis R., 167; 2 Greenl. Ev., § 163. Mr. *Gwynne, contra*, submitted the case without argument.

KAY, J., overruled the demurrer, holding that the word "made" in the statute, Swan, 555, § 4, had reference to the actual locality of the contract, and not to the place where *in contemplation of law* the contract was made. So far as the laws of New York could apply to this contract, *e. g.*, as to its construction, validity, legal effect, etc., the court would construe the rights of the parties as if it had been actually made there. But the limitations of actions not being governed by the *locus contractus*, the New York statutes cannot be applied to limit this action. *Demurrer overruled, and leave to plead.*

Messrs. *Walker and Kebler*, and *M. E. Curwen*, for Plaintiff.

Messrs. *Storer and Gwynne*, for Defendant.

323

COVENANT TO REPAIR.

[Wood County Common Pleas, October Term, 1850.]

MARY SPAFFORD, EXECUTRIX OF AURORA SPAFFORD, DECEASED, v.
FRANCIS MEAGLEY.

A covenant by a lessee, in a lease, to keep the fences in repair during his occupancy, will oblige him to rebuild fences destroyed by flood.

Where the court misdirects the jury, a new trial will be granted, with costs, to abide the event of the suit.

This was an action of covenant on a cropping lease, executed by the parties, January 7, 1848. By this lease the said Aurora Spafford, in his lifetime, agreed to lease his farm, on the Maumee river, upon certain terms, to the defendant, for the term of one year, for a certain share of the crops to be raised thereon. Among other things, the defendant covenanted "to keep the fences in good repair, while occupying said farm, and at the expiration of the lease to yield up quiet possession." He was prohibited from cutting wood or timber, except for his own fires, and to "keep the fences in repair."

The plaintiff assigned various breaches of the covenant; but the court and jury were satisfied, from the proof, that the plaintiff was not entitled to recover for any, unless it were for not keeping the fences in repair.

It appeared in proof that, just before the close of the lease, in the winter of 1848-9, a large portion of the fences on the premises were swept off and destroyed, by an unexpected and unprecedented flood in the Maumee river.

The plaintiff's counsel asked the court, among other things, to charge the jury that the defendant was bound to repair the fences thus destroyed. The court declined to so charge, and the jury returned a verdict for the defendant. Thereupon the plaintiff's counsel moved for a new trial; first, because the court erred in their charge; and, second, because the verdict was against the law and evidence.

W. H. Hopkins, for Plaintiff.

Way & Cook, for Defendant.

BY THE COURT—E. B. SADLER, PRESIDING JUDGE.

At the time of the trial, we very much doubted the correctness of the charge of the court to the jury. Since the motion for a new trial was made, we have taken time to examine the authorities, and will now give the result of our examinations. 324

It will be observed that the covenant in question is in these words, viz., "is to keep the fences in good repair, *while occupying* said farm." Taking into consideration that this was but a cropping lease, where both parties were interested in the preservation of the crops; that it was to continue but one year; that the fences would naturally need no repair of any consequence, except to be kept laid up during the year; that the parties did not contemplate any destruction of the fences by fires or floods; that the defendant had no idea of insuring against such accidents, at the time of making the contract, the court held, on the trial, that he was not bound to rebuild; that, it being a covenant to keep in repair, *while he occupied*, it was a performance of the covenant if he did keep them in repair during that period, so as to preserve the crops from injury. Were the court right in this construction?

It is a rule established in a multitude of cases, and never departed from to our knowledge, that where a tenant covenants to repair generally, and the buildings or tenements are destroyed, he is bound to rebuild and restore the premises in as good condition as when he received them. He is bound to make good all deteriorations from decay, and all injuries resulting from inevitable accident.

Where the *law* imposes an obligation or duty upon a party, and he is disabled from performing it by inevitable accident, he is excused. But where he takes upon himself an obligation, by contract, he is bound to make it good, notwithstanding the accident; for he might have provided against that in his contract. Therefore, if a lessee covenants to repair a house, though it be destroyed by lightning, he must make it good, or rebuild it. 3 Saunderson's Rep., 422 (n. 2.); 6 Mass. Rep., 238; Story on Contracts, 383; 6 Term Rep., 650; Archbold's Landlord and Tenant, Law Library, vol. 43, page 174.

The defendant in the present case will no doubt be surprised to learn that he has bound himself to rebuild fences thus destroyed; for we presume he dreamed of no such thing, at the time of executing the contract. Yet, if he has made such a covenant, he is bound to perform it. We must say, with Chief Justice Parker, "Men must be cautious in making their contracts, and not rely on the hardship of their cases to relieve them, when they are brought into difficulty." 6 Mass. Rep., 240.

Does this covenant, to keep in repair during the occupancy, require the defendant to leave the fences in repair at the expiration of his lease? If it do, then he is bound to rebuild. We have before remarked that, at the trial, we conceived it to be a compliance with the contract to keep the fences in repair, *during the occupancy*, so as to protect the crops. But, upon reflection, we think such a construction of the contract erroneous. Although it may be supposed to have been the leading object of the parties to secure the preservation of the crops, yet it may be presumed the lessor intended the premises should be kept in a suitable condition for immediate and future use at the close of the term. Although the contract does not, in words, require that he should restore the premises in as good condition as he received them, yet he is bound to keep them in this condition while he occupied them. If he had done this 325

he would have left them in the condition he found them. A covenant to keep in repair is the same as to deliver up in repair. The distinction the court made at the trial cannot, we think, be sustained, and a new trial must be granted, with costs to abide the event of the suit.

Where the court commits an error, for which a new trial is granted, it is a general rule, to order that the costs abide the event of the suit. *Contra*, when the jury find against the evidence. In the latter cases the motions are generally granted on the payment of the costs of the term.

GIFT OF ONE'S NOTE.

[Sandusky Common Pleas, March Term, 1851.]

JOHN AND JESSE PRIOR V. GEORGE REYNOLDS ET AL.

IN CHANCERY.

A note executed by the donor, and given to the donee, in consideration of love and affection, to take effect at the donor's death, cannot be enforced against the donor's estate.

R. J. Bartlett and R. P. Buckland, for complainants.

J. L. Green, for defendant.

Isaac Prior, the father of the complainants, died, leaving a *will*, and the complainants were both heirs and devisees. After the making of his will, and shortly before his death, out of love and affection for the defendant, George Reynolds, he executed and gave to him the following note, declaring he intended he should have it, in addition to what he had given him in his will, viz.: "For value received, I promise to pay to George Reynolds, one hundred and seventy dollars, payable at the death of my mother, Rebecca Prior, January 22, 1848."

The bill in this case was filed to settle up the estate, and, among other things, the question was presented whether defendant, Reynolds, could enforce the collection of this note against the estate, or whether he was entitled to any thing by virtue of it.

The court, E. B. SADLER, President Judge, held that the note was void for want of consideration; that love and affection was not a valid consideration for a promise to pay money, though it might be for a deed or executed contract under seal; that it could not operate as a gift; to constitute a gift the specific article given must be delivered; a promise to give is a nullity; and it is immaterial whether the promise be in writing or by parol; the note is but a *promise* to give the money, and not the money itself.

It cannot be sustained as a *donatio mortis causa*. *Donatio mortis causa* is a gift of some particular thing to take effect when the donor dies, or at his death. In such cases the thing given must be delivered; a promise to give is not sufficient. That this note was intended as a legacy of so much money, to be paid out of the estate. Such legacies, to be enforced, must be made in accordance with the statute of wills. Swan's Statute, 992, 994.

The following authorities were referred to to sustain the above rulings of the court: 7 John. Rep., 26; Chitty on Contracts, 51; 14 Pickering, 198; 6 Washburn Rep., Vt., 238; 18 John. Rep., 145; 2 Vesey, Jr., 111, 119; 1 Vesey, Jr., 545; 9 Vesey, Jr., 1; United States Law Magazine, January No., 1851, page 92; 1 Story's Eq., section 607.

PARTIES ON FORECLOSURE.

374

[Pickaway, Ohio, Supreme Court, November Term, 1850.]

Before Justices Spalding and Avery.

[Reported by H. F. PAGE.]

ROBERT HILL v. JACOB WELSH ET AL.

A mortgagee who has assigned his whole interest, unconditionally, in a mortgage, though not by deed, is not a necessary party to a bill of foreclosure.

The complainant filed his bill to foreclose a mortgage executed by Welsh to Samuel Hunter, from whom the complainant claimed by an assignment. The assignment was in writing, but was not executed in the manner of instruments for the conveyance of real estate. It conveyed the whole interest of the mortgagee in the premises, unconditionally. Hunter was not made a party to the bill, and for this reason the defendants demurred.

Messrs. *Page* and *Hunter*, for the defendants, insisted that it was the aim of courts of equity to do complete justice, by deciding upon the rights of all persons interested in the subject matter of the suit. That this court endeavored to render it *perfectly certain* that no injustice was done by a decree grounded on a partial view of the case. Story's Eq. Pl., section 72.

That the mortgagee was a necessary party, because, first, the fee was in him, and could not be assigned except by deed; secondly, he should have an opportunity to dispute the validity of the assignment; thirdly, he should be present at the taking of the account.

The defendants also cited Story's Eq. Pl., sections 199, 153; *Lewis v. Mangle*, 2 Vez., 231; Mitford's Pleadings, 179; Cooper's Pl., 37; *Cathcart v. Lewis*, 3 Brown, 516; 1 Ves. jr., 463; *Ray v. Fenwick*, 3 Brown, 25, and Mr. Belt's notes; *Elderkin v. Schultz*, 2 Blackf. R., 345; *Saunders v. Macey*, 4 Bibb., 437; *Allen v. Crocketts*, *Id.*, 241; Story's Eq. Pl., section 189, and cases cited by him; also, *Whitney v. McKinney*, 7 T. C. R., 147; *Miller v. Bear*, 3 Paige, 468; *Trecothick v. Austin*, 4 Mason, 41. They commented upon the preceding cases for the purpose of showing that they established the doctrine of the defendants, or were cases of assignment by will or deed, or of lands under other choses in action.

Mr. C. N. Olds, for complainant, cited Story's Pl., section 153, 189 to 199; Wilcox's Prac., 611, and notes; 7 J. C. R., 144; 2 Randolph, 93; *Lessee of Perkins v. Dibble*, 10 Ohio R., 433; *Moore v. Bennett*, 11 Ohio R., 341. 372

The demurrer was overruled.

DOWER.

[Court of Common Pleas of Hamilton County, Ohio.]

HANNAH ROBERTS v. J. L. ROBERTS AND OTHERS.

The petitioner in dower must prove her marriage with the deceased. The marriage may be proved by reputation, but mere reputation of *cohabitation* is not sufficient.

Petition for assignment of dower. Plea, that the parties were never united in lawful marriage, and issue thereon.

Mr. A. Riddle, for Petitioner; *Messrs. Fox, French, and Pendleton*, and *Bates and Scarborough*, for Defendants.

The judgment of the court was pronounced December 30, 1850, by

WARDEN, C. J. Upon examination of the authorities the court supposed that cohabitation, together with the declaration of the parties themselves, that they had been legally married, would, even without the reputation of marriage, and even against the reputation of illicit intercourse be sufficient to prove a marriage. A reputation of illicit intercourse, might put the party on some kind of proof; but that would not disprove the declaration of the parties, whom the law presumes were married, and in a way recognized by the law itself, when they *declare* that they were married, and *cohabit as married persons*. But this case does not exhibit these circumstances. The declarations of the petitioner might have been consistent on the subject; but the declarations of Joseph Roberts were inconsistent. To overcome a reputation of illicit intercourse, the cohabitation should be the natural, usual cohabitation of man and wife, and the declarations of the parties should be consistent declarations of that relation. In the present case the cohabitation was not proven to be the usual cohabitation of man and wife; it was a secret cohabitation, few persons being permitted to know what the relation was as claimed by the parties themselves. They concealed their residence, avoided the public eye, and the reason given was a frivolous one, that Joseph
373 Roberts was apprehensive of proceedings against him for a breach of promise of marriage. To persons with whom Roberts wished to preserve his credit, he declared he was married; and to those who questioned him particularly on the subject, that he was not married.

It was not the general reputation that these persons were married. One witness, indeed, said that they moved in society as man and wife; but that statement was in reply to a leading question. There was, however, a heavy testimony against the presumption that these parties were ever reputed to be married. The neighborhood reputation was, that they were not married, and their most intimate acquaintances never regarded them as man and wife.

It was remarked, however, that on his death bed the behavior of the deceased was that of a fond and exceedingly affectionate husband; and the only way in which the court could understand the circumstances, was, that it was a case in which an illicit connection was supposed by the parties to be just as good in the sight of heaven as a regular marriage. The court, however, have nothing to say in regard to the marriage, except as a civil contract—and that was the only wise view the law could take of it—as it would be impossible to settle in this community the idea of marriage as a sacrament, or the reverse as claimed by the defend-

ants. It would be impossible for the court to say what marriages should be prohibited according to the natural law. The moment the connection was regarded as a question dependent on natural law, the conscience of men must be consulted. In deciding this case, the court had nothing to do with the effect of a contract in the sight of heaven. A simple agreement between the parties to live together without the solemnization of marriage, may, in the sight of heaven, be a valid marriage, and was formerly a good common-law marriage. 2 Kent's Comm., 87. The supreme court of the United States, however, in *Jewell v. Jewell*, 1 Howard U. S. S. C. R., 219, was divided in opinion on the text in Kent, that, in the absence of civil regulations for the contrary, a simple agreement to marry *per verba de presenti* without cohabitation, or *per verba de futuro*, and followed by consummation, constitutes a valid marriage. The court then adverted to the law as it existed in various states on the subject; and supposed that in Ohio the object of the statute was to exclude all attempts to define it as a sacrament, and to regard it merely as a civil contract. We hold, therefore, that a valid marriage, such as was contemplated in the statute, is simply a civil contract, and that no other can be regarded as a valid marriage. And we are constrained, after endeavoring to see whether another conclusion could be arrived at, to determine as chancellors in the case, that there was no marriage between the parties. The bill should be dismissed.

NOTE—Reputation of marriage is sufficient proof of marriage in petition for dower. *Fleming v. Flemming*, 8 Blackf. 234; *Morris v. Miller*, 4 Burr., 2057; *Birt v. Barlow*, Doug., 171; *Jacksou v. Claw*, 18 Johns., 346; *Doe v. Flemming*, 4 Bingh., 266; *Cheseldine v. Brewer*, 1 Harr & McHen, 152.

LIMITATION OF ACTIONS.

[Pickaway, Ohio, Supreme Court, November Term, 1850.]

Before Justices Spalding and Avery.

[Reported by H. F. PAGE.]

STATE OF OHIO, FOR USE OF J. H. LUTZ, ADMINISTRATOR, v. H. CHENOWETH AND OTHERS.

An action on a justice's bond, against him and his securities where the breach consists in the nonpayment of money, received in his official capacity, is not barred by the lapse of one year.

This was an action of debt upon the bond of H. S. Chenoweth and his securities, conditioned "well and truly to pay over all moneys received by him in his official capacity," as justice of the peace. The defendants, who were securities of the justice, pleaded that the cause of action did not accrue within one year next before the commencement of the action. The breach assigned by the plaintiff, was the receipt of money belonging to the administrator of Lutz, and a refusal to pay the same upon demand. The plaintiff demurred to the plea.

Messrs. Renick and Cradlebaugh, for the Defendants, cited *Swan's Stat.*, 554; *Mount Pleasant Bank v. Conway*, 18 Ohio Rep., 234.

Messrs. C. N. Olds and Jones & Smith, insisted that the case in 18 Ohio, did not apply to an action against a justice on his bond, if the breach consisted in the nonpayment of money, received by him in his official capacity.

The court sustained the demurrer.

396

CUSTODY OF CHILDREN.

[Before Hon. R. S. Hart, President Judge of the 20th Judicial Circuit, Montgomery County.]

[Reported by E. JEFFORDS.]

THE STATE OF OHIO EX REL. JOHN TAYLOR V. DAVID NISHWITZ.
HABEAS CORPUS.

Held: As a general rule in case of a separation between husband and wife, the father will be entitled to the custody of his infant children—but this right may be defeated by his bad character, moral unfitness, or infancy, delicacy, or, peculiar necessities that the children should be with the mother, or, by the husband's wrongfully driving his wife from his roof.

If a wife desert her husband without grave cause, she will not be entitled to the custody of her children.

Where husband and wife are living apart, the wife having the *possession* of the children, if she can show reasonable ground for her departure, and if the child be of very tender years, her possession will not be disturbed. The causes for a separation need not be such as would entitle her to a divorce.

Where the husband has the child, although of tender years, if well cared for, his *possession* will not be disturbed, unless the necessities of the child and its interest demand a change of custody.

The court will not *change* the custody of a child from one parent to the other, except where its necessities clearly demand it, or, where one or the other of the parties has obtained the custody by fraud, force, or stratagem.

The court will not lightly sanction the conduct of a wife in abandoning her husband, or justify her in the abduction of his children.

This was a habeas corpus to obtain the custody of a male child, between two and three years of age, the father and mother living apart. They had lived together about three years harmoniously, so far as the proof showed, on the farm of the husband's father, some fifty or a hundred yards from his house. On the 11th of September, 1850, the husband coming in from his work in the field, not finding his morning meal prepared, broke out in abusive language against his wife; told her she was lazy and could leave, he could do without her. She made no angry reply. The wife, without seeing her husband again, packed up her trunk, and a small bundle of clothes, and about eleven o'clock of the same day, took the bundle in her hand, and her child on her arm and sought her paternal roof. The next day the husband procured an interview with her at her father's house, which resulted in her returning at the end of the fourth day, and remaining until the 6th of October ensuing. One witness testified, that during this time the husband's treatment was un-
397 kind, that he quarrelled daily with his wife, and that they lived very unpleasantly together; but it was also in proof that he had said to others that his wife was to blame. Again, on the 6th of October, 1850,

she left without notifying her husband of her intention, and has ever since refused to return. In interviews between her and her husband, subsequent to her departure, she said her husband had generally treated her with kindness, charging the blame of her unhappiness upon his father's family; said she loved him yet, and would go five hundred miles in any other direction and live with him; but could not live with him in that place, and never would. He admitted that he had not always treated his wife right, that he had taken the part of his sisters when he ought to have taken hers. Up to the 11th of September, it was in proof by the testimony of the husband's family, that the wife, and these sisters had been upon the most friendly terms; but from the period of her return, this intimacy and friendly feeling had ceased. On the other hand, there was testimony showing that improper language had been used by one of these sisters about the wife long before, even before the child's birth. A suspicion was raised by testimony that an under current of unkind feeling and harrassing annoyances had been running against the wife in the Nishwitz family for some time, rendering her situation anything but pleasant. It was in proof that the husband's sisters had carefully nursed her through a protracted spell of sickness, and had been otherwise kind and obliging to her; though subsequent to her final departure there was evidence of a bad state of feeling on their part towards her and her father's family. The wife, on leaving the last time, took the child with her to her father's. The husband again sought for a reconciliation, which failed. He afterwards sued out a writ of habeas corpus to obtain the custody of the child, but the wife relinquished its custody before the service of the writ, saying if he wanted the child he could have it, without going to law for it. In visiting her child at the residence of her husband's father, after giving it up, she was not kindly received, nor permitted to have that free access to it which a mother ought. She was proven to be a woman of pure character and amiable disposition; her family good, and in comfortable circumstances. The husband was shown to be a man of industrious habits, though of petulant disposition, but of good moral character. His family was also respectable and in good circumstances. The child was in his father's family, and in the language of one of the witnesses, "is as kindly taken care of, as 398 it is possible for a child to be without the care of its mother."

The case was very ably and elaborately discussed on both sides—the argument of it occupying the entire day.

Messrs. Haynes & Howard and *S. Craighead*, the counsel for the relator, maintained—That no question as to the right of *guardianship* arose under this writ, that the question was only as to the proper *custody* of the child. That the mother was the proper person to have that custody, and that if the father kept it from her custody, and in his own, it was an illegal and improper restraint, from which the child was to be relieved by this writ. They claimed that it was not the right of the father or mother which was to be tried, but it was the *right of the child*. The interest and welfare of the child was to be looked to, in determining with which of the parents it should be placed; and as every child, so young, needed the care and nurture of a mother, it was *the right of the child* to be placed in her custody and under her care, though the proposition that the father was generally entitled to the custody of his infant children as their best and safest *custodier*, might be true. Yet, whether he should have it, depended upon the circumstances in any particular case. He might be disqualified not by immorality of character alone,

but by insanity or imbecility; by inability, from poverty, to maintain and provide for his children; or because by their delicacy and tender age, he cannot properly take care of them and supply their wants. Though a wanton desertion of husband, by a wife, might be a sufficient cause to withhold from her the custody of her child, as showing her unfitness for it, yet if there was cause to excuse her separation from him, though not entitling her to a divorce, the court should place the child with her, if best for the interest of the child. Where the husband and wife are living apart, the question who shall have their child, is to be determined by the age, the health, or sickness of the infant, and the consideration whether the father or mother is best fitted for its care, under the circumstances. It could make no difference that the *active interference* of the court was sought to take the child from the father, and give it to the mother. It being the right of the child which was to govern, the decision of the court should be according to that right, and if the welfare of the child demanded that it should be with its mother, it was under illegal restraint by the father, when detained from her custody, and the court could no more
 399 refuse to relieve it from that restraint, and take it from the father, than they could take it from the mother and give it to the father. They cited *Rex v. Delaval*, 3 Burr., 1434; *Matter of Wollstoncraft*, 4 Johnson's Chy. Rep., 80; *The People v. Mercien*, 8 Paige, 47; S. C., 25 Wendell, 72; *The State v. Smith*, 6 Greenl. R., 462; *Commonwealth v. Maxwell*, 6 Law Reporter, 214; *Matter of Gregg*, 5 Western Law Journal, 169; *State on Relation of Ball v. Hand*, 5 Western Law Journal, 361.

Messrs. Crane & Davies and *C. L. Vallandigham*, for the respondent, relied upon the following points and authorities.

First. That the father is by nature and law entitled to the custody of his infant children and has a paramount right over the mother, which nothing but a strong and clear case of unfitness on his part can justify a court in interfering with; especially to *change* the custody from the father to the mother. *Rex v. Clarkson*, 1 Strange, 444; *Rex v. Smith*, 2 Strange, 982; *Ex parte Hopkins*, 3 P. Williams Reps., 152; *Rex v. De Manville*, 5 East., 219; *Rex v. Deleval*, 3 Burrow, 1434; *King v. Greenhill*, 31 Eng. C. L. Rep., 155; 4 Adol. and Ellis, 624; *De Manville v. De Manville*, 10 Vesey, 52; 2 Story Eq. Juris., § 1340, 1341, 1342; *Commonwealth v. Briggs*, 16 Pickering, 203; *Matter of Wollstoncraft*, 4 Johnson Ch. Rep., 80; *The People v. Mercien*, 3 Hill, 399; *United States v. Green*, 3 Mason Rep., 482; [2 Kent's Comm., 205; *Farkington v. The State*, 1 Smith's Indiana R., 168.—EDS. OF W. L. J.]

Second. That the reasonable cause which justifies a wife's desertion must be such as would be sufficient ground of divorce. *Butler v. Butler*, 6 Western Law Journal, 382.

Third. That the court must be satisfied that the infant is not suitably provided and cared for, where it now is, in the father's custody, before they will interfere to remove it; and that a strong case must be made out.

Fourth. That there is a marked difference between the *active interference* of the court against the father, and its simple refusal to interfere in his behalf to enforce his right.

Fifth. That upon the general principle of the sacredness and inviolability of individual rights; upon the "*let alone principle*," which lies deep at the foundation of republican government, and requires that the largest individual liberty shall be allowed, consistent with the rights and

interest of the whole body-politic; courts ought to be extremely cautious how they interfere with domestic duties and rights, except a case strongly made out, and upon broad and general considerations, demanding it. 400

HART, P. J., after reviewing the authorities at length, in announcing the decision of the court, said:

From all these authorities, we deduce the following propositions:

First. That as a general rule, in cases of a separation between husband and wife, the father will be entitled to the custody of his infant children; but this right may be defeated by his bad character and moral unfitness for the trust, or by their infancy, delicacy, or peculiar necessities that they should be with the mother; or, by his misconduct, in driving his wife from his roof.

Second. That as a general rule, if a wife deserts her husband, and applies for the custody of her children, or takes them with her, and the husband applies to recover their custody, it will be for her to show that she did not desert him without grave cause, and until her further living with him became intolerable from his tyranny, oppression, neglect, or abuse. We do not believe that the causes for a separation are required to be the same which would entitle her to a divorce, but, on the contrary, that cases might arise in which there would be no ground for a divorce, and the wife still be entitled to the custody of her infant children.

Third. That in case of conflicting claims between the husband and wife, living apart, to the custody of one or more of their infant children, if the wife has the possession and can show a reasonable cause for her departure, and if the child be of very tender years, and she is in every respect qualified for the trust, the court will not disturb her in that possession.

Fourth. That where the husband has the child, although it may be of tender years, yet, if it is well provided for, if it is in the bosom of a kind and respectable family, is kindly nursed, watched over and cared for, his possession will not be lightly disturbed; and that, in such a case, and indeed in all cases, the necessities of the child and its interests alone, can be made the grounds of a change of custody.

Fifth. That the power to change the custody of the child between contending parents living apart, is a delicate discretion, not to be exercised, except in cases in which its necessities clearly demand it, or where one or the other of the parties has obtained the custody by fraud, force, or stratagem.

Sixth. That the court ought not rashly to sanction the conduct of a wife in abandoning her husband, or justify her in the abduction of his children. 401

The child is well taken care of where it is. As to the moral fitness and pecuniary circumstances of the husband and his father's family for the trust, there is no question. The wife has not shown justifiable grounds for leaving her husband, nor that the peculiar necessities of the infant demand its restoration to her. Its mere infancy is not a sufficient ground. If this were so, the books would declare it; but they do not. It is a great misfortune to the child to lose the care of its mother; but the law cannot remedy that misfortune in this case. The child is where the wife has placed it by her own unconstrained act. We have from the first of the case desired to return it to the arms of its mother, but regret to say that there is neither law nor testimony to justify us in such a course. Let the child be remanded to the custody of the father

416

INSURANCE.

[Hamilton, Ohio, Supreme Court, March Term, 1851.*]

Before Justices Hitchcock and Spalding.

HICKS V. THE MERCHANTS' AND MANUFACTURERS' INSURANCE COMPANY.

Where, by the terms of a policy of insurance, the adventure upon the property is to begin from and after the lading thereof on board, the policy attaches, although a warranty that the boat shall be manned by a given number of men, is not complied with. The risk commences from the time the goods are put on board.

If the policy attaches for a moment, the insured is not entitled to a return of the premium.

This case came up upon writ of error from the commercial court of Cincinnati. The plaintiff, a merchant at Perrysville, Indiana, and owner of the "Flat-boat Number Eight," and her cargo, in May, 1847, wrote to William Hyatt, his agent at Cincinnati, to procure a policy of insurance on the boat and cargo from Perrysville to New Orleans. The agent applied to the defendants, who on the 25th of May, 1847, made the insurance by an indorsement on an open policy. The policy contained a provision that the crew of the flat boats of the class to which this boat belonged, should consist of four men and a pilot. It was admitted on the trial, that this boat was one requiring, under the policy, to be manned by four men beside the pilot; and that it had at no time more than three. The boat left Perrysville, with her crew of three men and a pilot, on the 25th of May, 1847, and on the 28th of May was stranded, by which accident the cargo was partially lost. The boat was lighted off, and
417 finally completed her voyage to New Orleans in safety, where a protest was regularly drawn up before a notary by the master. These facts being afterwards communicated to the insurance company, together with an appraisement of the damage sustained, the company refused to pay the damage, or to return the premium.

These facts were submitted to the court below, without the intervention of a jury, and the court found for the defendant. The errors assigned were, that "the court erred in deciding that the policy attached while the boat was lying at the landing at Perrysville before sailing and before the requisite number of hands required by the terms of the policy, were upon the boat; and that having attached without complying with the conditions of the policy, that the plaintiff forfeited his right to recover [the premium], after the boat sailed by putting on the number of hands required by the policy; and that the court erred in deciding that the policy ever attached to the boat, until the express conditions thereof were complied with by the plaintiff."

Messrs. Morris, Tilden & Rairden, for plaintiff in error.

The plaintiff is entitled to recover the premium, under the common counts, the risk never having commenced. *Tyrie v. Fletcher*, Cowper, 668; *Hughes on Insurance*, 335. The risk did not commence, because the provision for a given complement of men as the crew,

*In reporting the opinions of the court, the editors acknowledge their indebtedness to the very accurate notes of Mr. T. Shinkwin, reporter for the Cincinnati Commercial newspaper.

being a condition precedent to the commencement of the risk, was never complied with. *Hughes*, 203, 233; *Dehahn v. Hartley*, 1 Darnford & East, 345; *Fashaw v. Chabert*, 3 Brod. & Bing., 158; 3 Mee. & Welsby, 456; 4 Campbell, 111; *American Insurance Company v. Ogden*, 15 Wendell, 532; *Silva v. Low*, 1 Johnson's Cases, 184; *Craig v. Insurance Company*, Peters Cir. Court R., 410; *Taylor v. Lowell*, 3 Massachusetts, 331, 392. See also, *Porter v. Bussey*, 1 Mass., 455; 10 Mass., 26; *Merchants' Insurance Co. v. Clapp*, 11 Pickering, 56, 227; 1 Binney, 592, 2 Washington Cir. Court R., 262, 339; 1 Metcalf, 21; Marshall on Insurance, 156, 363, 557.

The boat was one ordinarily navigated by three men. When the plaintiff directed his agent to insure it, the presumption is that the principal contemplated the subject as it was. He directed a policy of insurance to be obtained upon a boat to be navigated by three men; consequently, the agent had no authority to enter into a warranty to provide more, and the policy was void at its inception. Story on Agency, § 165 and following § 191. 418

Messrs. Coffin & Mitchell, for defendants. The policy was "on property, lost or not lost;" "beginning the adventure upon the said property from and after the lading thereof on board." The policy therefore attached to the property the moment the goods were put on board; 1 Phillips on Insurance, 438, 448; 3 Johnson's Cases, 12; 8 Johnson's R. 1, 8; *Taylor v. Lowell*, 3 Mass. R., 331, 346; *Merchants' Insurance Company v. Clapp*, 11 Pickering, 56, 227; and if the policy attached for a moment, there can be no return of the premium; 2 Phillips on Insurance, 526; *Hendricks v. Commercial Insurance Company*, 8 Johnson's R., 1; 3 Mass., R., 331; *Marine Insurance Company of Alexandria v. Tucker*, 3 Cranch, 357; S. C., 1 Peters's Cond. R., 561. The warranty as to the pilot and hands applies to the *voyage*, and not to the *risk*. It was, not therefore, a condition precedent to the policy attaching to the goods.

As to the agency; the principal ratified the contract by claiming the benefit of it, and by suing on the policy. Besides, there is no evidence as to the intentions of the principal.

SPALDING, J. The action below was a policy of insurance taken on a flatboat and cargo of produce, for her voyage from Perrysville, Indiana, to New Orleans. The policy bore date 25th June, 1847, and on the same day the boat departed on her voyage. The warranty in the policy required a boat of that description to be manned by four hands and a pilot. The boat had, however, but three men and a pilot; and after progressing two days, she was stranded on the rapids of the Wabash, and a portion of her cargo lost. The boat, however, being lightened, proceeded on her voyage. The insured commenced this suit below against the company to recover the loss sustained on the cargo; but in the progress of the trial, abandoned their special count on the policy, and finally relied on the general count to recover back the premium paid; claiming, that inasmuch as the boat was not manned by a sufficient number of hands, the risk had not attached, and that they were therefore entitled to the return of the premium. The commercial court ruled otherwise, and very properly. If the risk attached but for an instant of time, the premium cannot be recovered back. The risk did attach on this cargo the instant it was placed on the flatboat at Perrysville, before it became necessary for the hands to be on board at all; and the company

419 would have been responsible had that cargo been then destroyed by any of the accidents contemplated. Suppose this boat had proceeded with three hands and a pilot on her voyage to New Orleans in safety, and there discharged her cargo, which should be disposed of for the benefit of the owners; could they sue the company for a return of that premium? Suppose another case; that the boat had proceeded with three hands and a pilot, for two or more days, with perfect safety; that, at the end of the fourth day she had taken on board an additional hand, and on the fifth day, when she had her full complement, met with a loss; could not the insured recover for the damage? Certainly. The court is of the opinion from the evidence, that this risk attached at the moment the property was put on board, and having attached, the premium paid cannot be recovered back. We settle this question now to prevent further difficulty; and would suggest that this court can not be expected to look into the evidence, for the reason that the facts had been submitted to the judge without the intervention of a jury, and on these facts he pronounced the law and rendered a judgment. That judgment was excepted to, and a motion made for a new trial, which was overruled. The overruling of that motion not being excepted to, this court cannot look into it. The judgment of the court should be affirmed.

DEPOSITIONS.

BUSS & COMPANY V. HORROCKS.

Depositions may be taken at any time after the service of the writ, whether the case be at issue or not.

A note was made payable at the "Mad River Branch Bank at Springfield." Proof of the demand at the "Mad River Valley Branch Bank at Springfield," there being no proof that there was any other bank in Springfield, was held sufficient.

ERROR to the commercial court of Cincinnati. Suit was brought in the commercial court against the plaintiffs in error, as indorsers of a promissory note drawn by Thayer, in favor of Buss & Company, payable ninety days after date at the Mad River Branch Bank at Springfield, and indorsed by them to the defendant in error. While a demurrer to the declaration was pending, the plaintiff below took the deposition of the notary to prove the fact of due notice having been given, which was not alleged in the declaration. This was one of the grounds assigned for 420 error. It was also objected that the deposition having been irregularly taken, and being the only evidence in the case as to notice, there was no sufficient proof of notice, as alleged in the amended declaration; and lastly that proof of presentment and demand at the Mad River Valley Branch Bank, did not support the allegation in the declaration of such demand at the Mad River Branch Bank.

Mr. T. Freon, for Plaintiffs in Error, cited, as to the first point, 1 Starkie's Evidence, *370; Swan's Stat., 706, note; as to the second, Bailey on Bills, 512, note (w), 514, §§ 2—7; as to the last point, 1 Chitty's Pleading, 282, 287; Bailey on Bills, 429, 441; 1 Starkie's Evidence, 383, 398, 399, 419, 427, 429, 432.

Messrs. Storer & Gwynne, for Defendant.

SPALDING, J. This is an action by an indorsee against his immediate indorsers, the payees of the note. The note was made at Springfield, in Clark county, promising to pay Buss, ninety days after date, at the Mad River Branch Bank of that city, \$132. In the declaration filed below there were two counts; a special count on the note, indorsement, presentment, etc., and a general count for money had and received. A demurrer was interposed to this special count, because it did not aver notice of presentment for payment to the maker. The demurrer being eventually sustained, an amendment of the declaration was had accordingly, and averment of notice inserted. It is assigned for error that the court erred in admitting as evidence the depositions of the notary to prove the presentment for payment, the protest, and the mailing of the notice. The reason assigned why this deposition should be overruled, was, that at the time the notice was given to take the depositions, the demurrer was pending, and there was then in fact no averment of notice in the special count in the declaration. The court overruled this exception, and received the testimony. We think the objection not tenable, for a moment. It has never yet been ruled by this court, that depositions could not be taken by either party, at any time after the writ is served. It is objected again that there is a variance between the bank named in the note and the bank at which the notary says the note was presented for payment. The note speaks of the bank as the "Mad River Branch Bank," and the notary says he presented it for payment at the "Mad River Valley Branch Bank." The pleader in the declaration followed the description in the note; but it appears there was but the one bank in Springfield, and no variance was pretended between the note itself and the proof. No doubt arose that the bank named by the notary was the bank contemplated in the note. We think this objection of rather a trifling character. It was claimed, also, that there was no due and regular notice proved to the indorser, but the court thought otherwise, and gave judgment for the plaintiff for the amount of the note and interest. A motion for a new trial was overruled, and exceptions being taken, the question is brought before us, whether, on the whole testimony, the court erred in overruling that motion. As far as regards the notice to the indorser, it appears the young men who took it for the purpose of serving it on Buss & Company, had gone to California, and could not be produced on the trial. It was proved he left the counting house with the notice. The son of the plaintiff testifies that on the next day after the notice was presumed to have been served, Buss came into the counting room with the notice in his hand, and said that in a few days the maker of the note would pay it. We think this satisfactory proof the notice was served. The court, therefore, acted correctly in overruling the motion.

Judgment affirmed.

DEMAND ON NEGOTIABLE PAPER.

FOX V. NEWELL.

Where a note is by its terms made payable at a particular place, a demand at that place, on the day that it falls due, although made after the close of business hours, is sufficient, provided there is any one there to answer to the demand. It is not necessary in order to fix the liability of the indorsers, that the notice of protest should state that the note was presented for payment.

ERROR to the supreme court. Fox was sued as indorser of a promissory note, drawn by Hunt in his favor, and indorsed by him and made payable at the Franklin Bank of Cincinnati. The note not being paid at maturity was protested for nonpayment, and the question raised by the bill of exceptions was whether due demand was made of the maker. The notice of protest stated that "after demanding payment at the Franklin Bank, Cincinnati, at the close of bank hours, and receiving for answer, 'No funds in bank to pay it,' the notary then protested it for nonpayment and notified the indorsers thereon."

The objection made was that the demand should have been made during bank hours, and not after; and that the notice did not show that any presentment had been made for payment.

422 *Messrs. Fox & French*, for Plaintiff. When a note is made payable at a banker's, demand must be made during bank hours. 1 Barbour, 158; 3 Denio, 145; 1 Barr, 178; *Davis v. Herrick*, 6 Ohio R., 55; Story on Notes, § § 199, 200, 230, 226, p. 258, note 4; *Parker v. Gordon*, 7 East, 383; 2 Brod. & Bing., 165; *Gibb v. Mother*, 8 Bing., 214; *Bank of United States v. Smith*, 11 Wheaton, 171. As to presentment: *Sanderson v. Bower*, 14 East, 500; *Roche v. Campbell*, 3 Campbell, 247; *Whittaker v. Bank of England*, 6 Carr & Payne, 700. As to demand: Story on Notes § 350, p. 428.

Mr. Zinn, for Defendant.

HITCHCOCK, C. J., in delivering the opinion of the court, held where a note is by its terms made payable at a particular place, a demand at that place, on the day that it falls due, although made after the close of business hours, is sufficient, provided there is any one there to answer to the demand; and that upon the protest of a note it is not necessary in order to fix the liability of the indorsers, that the notice of protest should state that the note was *presented* for payment. The design in giving notice was that the indorser might take steps to save himself from loss, if he could do so; and a knowledge of the fact that the note had been protested being communicated to him, was sufficient to put him on inquiry.

Judgment affirmed.

[The decisions of this term will be continued in the next number.]

INSURANCE.

470

[Hamilton, Ohio, Supreme Court, April Term, 1851.]*

CINCINNATI MUTUAL INSURANCE COMPANY v. COREY.

Insurance—Extra-hazardous goods—Gunpowder.

Held, that a policy of insurance on a country store, forbidding the storing of gunpowder therein, or the exercise of the trade of retailing gunpowder, was not avoided by the insured keeping in the store a keg of gunpowder and retailing it in the quantity usual in country stores.

ERROR to the commercial court of Cincinnati. This was an action on a policy of insurance on a store and contents in Freeport, Indiana. By the terms of the policy, it was to be void if the store were "appropriated, applied, or used, to or for the purpose of carrying on or exercising therein any trade, business, or vocation denominated hazardous, in the conditions annexed to the policy, or for the purpose of storing therein any of the articles, goods, or merchandize," without the consent of the company. The conditions annexed to the policy describe goods "not hazardous" as "such as are usually kept in dry goods, grocery, hardware, and produce stores;" and enumerated as "hazardous," "apothecaries and druggists, gunpowder, paint stores, oils, spirits of turpentine," etc. The plaintiffs in error, the defendants below, pleaded, among other pleas, that the building was appropriated, in connection with the sale of the "usual stock," to the trade of *retailing* gunpowder; and in another plea, that it was used for the purpose of *storing* therein gunpowder. Upon these pleas issue was taken, and the jury found a special verdict that "the plaintiff below," the now defendant, "kept in his store, as part of his stock in trade, paints, oils, varnishes, medicines, and powder, in such quantities and portions as are usual and common in country stores," and found for the plaintiff \$3,570 damages, upon which judgment was given.

The evidence showed that the store, a frame building, took fire about midnight, about ten feet from the northeast corner; that there was a keg of gunpowder in the store, under the counter on the north side of the store; and that the clerks belonging to the store from the density of the smoke and the fear of an explosion by the powder, could not save 471 any of the property. Some, who were not aware of the powder being in the store, ventured in, but were driven out by the suffocating smoke from the woolen goods. In ten minutes after the doors were thrown open, the whole building was enveloped in flames and became a total loss.

As to what was usually kept in a country store, the witnesses testified, in general terms, that this store had the usual assortment. Some were not aware that a keg of gunpowder was kept in the building; and others said, it was usual to sell gunpowder, but the keg was usually kept in a different building.

The principal question was whether the gunpowder was "stored" within the meaning of the policy.

Messrs. Coffin & Mitchell, for plaintiffs in error.

Messrs. Storer & Gwynne and *King & Anderson*, for defendants.

SPALDING, J., delivered the opinion of the court and held that the keg of gunpowder was not stored in the store within the meaning of the policy, nor was the store appropriated to the trade of retailing gunpowder.

Judgment affirmed.

LEASE—WHO BOUND TO EXECUTE.

BRADLEY v. MASON.

Where a lessor contracts "to give a perpetual lease," it is his duty, and not that of the lessee to make out and tender the conveyance.

Upon a bill to review a decree of the supreme court of Ohio, wherein a party claimed a specific execution of a contract to grant a perpetual lease, it was insisted by the plaintiff in review, that the lessor was bound to execute and tender the conveyance. The defendant, on the other hand, contended that that was the duty of the vendee, and that in his omission to perform it, he was guilty of laches, which discharged the defendant from his contract.

Messrs. Ketchum & Headington, King & Anderson, and Curwen, for plaintiff, cited *Sweitzer v. Hummel*, 3 Sergeant & Rawle, 228; *Hampton v. Specknagle*, 9 Sergeant & Rawle, 212; *Fuller v. Hubbard*, 6 Cowen, 1; *Connelly v. Pierce*, 7 Wendell, 131; *Tinney v. Ashley*, 15 Pickering, 552; *Hill v. Horbart*, 4 Shepley's Maine R., 167; note to 10th edition of Sugden on Vendors, 375.

Messrs. Storer & Gwynne, Spencer & Corwin, and Hart, for the defendant, cited Sugden on Vendors, 375; *Fuller v. Williams*, 6 Cowen, 13; 7 Cowen, 53.

HITCHCOCK, C. J., in delivering the opinion of the court, held that the American rule was, that the grantor or lessor, who had contracted to give a deed or lease, was bound to have it executed and tender it to the grantee or lessee.

INSTALLMENTS—MORTGAGE.

COBB v. VOORHEES.

SPALDING, J., delivered the opinion of the court.

Held, that parties may agree that a credit given in installments shall cease and the whole debt become due upon default in the payment of any one of the installments. Where a mortgage has been executed to secure such a debt, on the default in the payment of the first installment, the property may be sold for the payment of the whole debt.

BILL OF EXCEPTIONS.

SHOUP v. GREEN.

Held, that the bill of exceptions must not only be signed, but *sealed*; and that such signing and sealing must be during the term at which the trial took place and cannot be done afterwards.

PARTNERSHIP—PLEADING.

MARTIN, ANSHUTZ & CO. v. PARKER.

The plaintiffs in error were sued by their partnership name, without setting forth the names of the individual members of the firm, under the act in aid of the law regulating suits by and against companies and partners. 44 Ohio Laws, 66. It was assigned for error that it was not averred in the declaration, and nowhere appeared on the record, that the plaintiffs in error, the defendant's below, were "a company or association of persons, formed for the purpose of holding any species of property within the state of Ohio." 473

SPALDING, J., held that no such averment was necessary. If they were not such an association, it laid on their part to show it. The statute is general and gives to the plaintiff the privilege of suing an association of individuals, not an incorporated company, by their associated name, irrespective of the names of the individual members of the firm.

Judgment affirmed.

Messrs. McGuffey & Holcombe, for Plaintiff in Error.

Mr. T. J. Henderson, for Defendants.

CONSTITUTIONAL LAW—TESTIMONY OF DECEASED WITNESS.

STATE OF OHIO v. JAMES SUMMONS.

Held, that the constitutional right of the accused to meet the witnesses against him face to face, is not infringed by the admission of the testimony of the witnesses, who swear to the substance of what was testified to on a former trial, by a witness who has since deceased. Such evidence will be excluded, unless the witness can swear to the substance of the whole testimony, as well that upon cross-examination as upon the examination in chief; and considering that the jury are not able by a personal inspection of the witness's manner to judge for themselves of the amount of credit due to his testimony, and from the liability of those who heard him to err in their narration of his evidence, such testimony is to be received with caution.

493

PLEADING.

When Consideration Should be Averred.

[Logan, Ohio, Supreme Court, June Term, 1851.]

Before Justices Caldwell and Ranney.

[Reported by WILLIAM LAWRENCE.]

JOHN NISWANGER V. ISAIAH STALEY.

1. A declaration upon a special contract not under seal by the common law must set out the whole consideration upon which it is founded; but negotiable instruments are an exception to this rule.
2. The common law rule, that a declaration on negotiable instruments need not set out the consideration, has been extended to notes not negotiable, either for want of words of negotiability, or because of conditions that destroy their negotiable character; provided, such notes are payable for a sum of money certain, though it is not material that the payment may depend upon a contingency, or that the sum to be paid may be discharged by the delivery of specific articles.
- 494 3. The rule dispensing with the averment and proof of consideration, has never been extended to contracts for the delivery of specific articles or for services, where a sum of money certain is not specified.
4. The rule dispensing with the averment of consideration, applies to any absolute promise to pay a certain sum of money, at a specified time, if it constitute the entire contract; and it is not material that such promise does not contain the words "for value received," nor that the sum certain may be discharged in specific articles, or be payable on a contingency.
5. A contract in these words, "I have agreed to and promise to deliver eighty cords of stone to I. N., or order, on his part of mill-dam at any time when called on," is not a promissory note, and cannot be recovered upon without averment and proof of consideration.
6. Such contract is not evidence under the common counts with proof of the facts disclosed in the bill of exceptions in this cause.

[Upon the law as here decided the precedent of a declaration found in Wilcox's Forms and Pr. (new ed.), p. 54, No. 15, and in 1 Swan's Prac. 309, No. 10, upon a promissory note for the delivery of five hundred bushels of wheat, would be bad on demurrer. The points decided as above were submitted to and approved by the judges.]

This is a writ of error to the common pleas of Logan county. The action below was assumpsit on an instrument in the form above stated, executed by Staley to Niswanger, the plaintiff below, who is also plaintiff in error. The declaration counted specially on the instrument, and contained the common counts. The first special count averred that the instrument declared on was executed "in consideration that plaintiff had promised, etc., to pay said Staley upon the delivery of eighty cords of stone whatever they should be reasonably worth," etc. The second count averred that Staley's promise to deliver the stone was made in consideration of a prior indebtedness of \$500. The third special count was upon the instrument, as upon a note payable in stone, without averring any consideration and substantially pursued the form in 1 Swan's Practice, 309, No. 10, and Wilcox's Forms (new ed.), 54, No. 15.

Plea of the general issue to first two special and the common counts. General demurrer as to third and special count.

The court below sustained the demurrer to the third special act and the cause was tried upon the other counts.

On the trial, the plaintiff proved the execution of the instrument declared on, a demand of the stone, and refused to deliver them; that the

parties were owners of land on opposite banks of the Miami river; that Niswanger had built a dam across the river and used it for his mill; that Staley, being about to build a mill, claimed the right to use the dam and to take out water by his race, which right Niswanger denied; and that the parties made a written agreement, which defined the right of each to the use of water, and that the contract declared on was given in consideration of the right to the use of the dam and water thus secured to Staley and in the consideration of the previous construction of the dam by Niswanger, all of which constituted the consideration for the promise to deliver the eighty cords of stone, the value of which was also proved. The plaintiff having rested, the defendant moved a nonsuit, because

1. The evidence of the consideration was not the same as that averred in the declaration.

2. The evidence was not competent under the common counts.

The motion prevailed, and a motion for a new trial, on the part of the plaintiff, was overruled; all of which, with the facts proved, appeared by a bill of exceptions.

The material errors assigned were that the court erred, because

1. The demurrer to the third special count was sustained.

2. The court sustained the motion for nonsuit, and refused to grant a new trial.

Messrs. Corwin, Stanton and Hubbard, for Plaintiff in Error.

1. The court erred in sustaining the demurrer. The instrument declared on is a *note payable in trade*. Upon such notes, it is not necessary to aver or prove a consideration. This is the settled practice which can not be changed without overcoming principles recognized by the courts and adopted by our elementary writers. Wilcox's Forms (2 ed.) 54, No. 15, note *a*; *Dugan v. Campbell*, 1 Hammond, 118; *Ring et al. v. Foster*, 6 Ham. Ohio Rep., 280; 1 Swan's Pr., 309, No. 10, note *y*. Under these decisions it is not necessary that the note should be a negotiable instrument, or a note within the meaning of the law-merchant.

2. The same principles also apply to the other special counts, and if recognized as law the plaintiff was entitled to judgment.

Mr. William Lawrence, for Defendant.

1. As to the demurrer. It was properly sustained, because the count did not aver any consideration. It is a rule of pleading that a declaration upon every contract, not under seal, except negotiable instruments, must set out a consideration; and it is a rule of evidence, that the consideration must be proved as averred. These rules of the common law have only been slightly modified in Ohio. 1 Greenl. Ev., § 66-68; 2 Stark. Ev., 86; Chitty on Cont., 105, 734; 1 Swan's Pr., 309*u*, 196*u*; *Ring v. Foster*, 6 Ohio R., 280; *Dugan v. Campbell*, 1 Ohio R., 118; Gould on Pleadings, C. IV., § 11, p. 174-173, § 7

I am aware Swan and Wilcox have both furnished the precedent of a declaration on a note for the delivery of five hundred bushels of wheat, without averring a consideration. These rest upon an *obiter dictum* of the court in 1 Ohio Rep., 119, that it is not necessary to aver consideration on "a written promise to pay a sum of money or other property for value received." This does not sustain the precedents; for in a note to both of the precedents it is said the note need not contain the words "for value received." The authority in 1 Ohio Rep. required that the note should.

But I apprehend the court in 1 Ohio Rep., 119, did not intend to extend the rule farther than to apply it to a note payable for a sum certain; to be discharged by the delivery of specific articles. Such was the note

under consideration, and such note, upon failure to deliver the specific articles, is for all purposes a note payable in money.

The case in 6 Ohio Rep., however, was on a note that did not contain these words, and the court lay down the rule that the note must be an absolute promise to pay a sum certain, at a specified time, which must constitute "the entire contract." Both these cases were on notes for a *sum certain*; the one payable on a contingency, the other to be discharged by the delivery of specific articles (currency). This is the extent to which the courts have gone. It has never been held by a court that a note payable in specific articles was evidence, on which a recovery could be had, without averment and proof of consideration. To hold otherwise is to introduce a great innovation on common-law principles. A *nudum pactum* for the *first time* would be made the foundation of an action where the law never implied a consideration.

II. The contract to deliver stone was not evidence under the common counts:

1. Because by the law as shown, no recovery can be had, except upon the averment and proof of consideration. 10 John., 420; 7 John., 322.

2. No recovery can be had on the common counts, "unless the case be such that supposing there had been no special contract the plaintiff may still recover;" and this is not such a case. 7 Johns., 132; 1 Pick., 119; 1 Swan's Practice, 211, and note citing sundry authorities; 1 497 Greenl. Ev., § 104; 2 Stark., 96-7, note; 18 Johns., 457.

3. The agreement to deliver stone was made in consideration of the contract settling rights of the parties, by which Niswanger was to keep up part of the dam, etc. Both these contracts formed part of the entire contract. They were subsisting, and the plaintiff's promise to keep up part of the dam was a continuing promise which he had not and could not have fully performed. The right to sue upon the common counts, where there is a special agreement, applies only to cases where the contract has been fully performed by the plaintiff. 2 Greenl. Ev., p. 89, § 104.

RANNEY, J., delivered the opinion of the court holding that there was no error in the record and proceedings of the court below. The courts in this state have never held that a contract for the delivery of specific articles, or for the performance of services, is such an instrument that a recovery can be had upon it, without averment and proof of a consideration paid, tendered or agreed on. The contract declared on is not a promissory note, and cannot be recovered upon, without averment and proof of a consideration. The cases referred to, 1st and 6th Ohio Reports, only extend the rule dispensing with averment and proof of consideration, to notes, which are payable for a sum certain, at a specified time, though the payment may depend on a contingency, and the sum certain may be discharged by the delivery of specific articles, or the performance of services. Upon failure to deliver the articles, or perform the services, such notes become payable in money. In the case in 1st Ohio Reports, though the language of the court is not precisely definite, yet it is not supposed the court intended to extend the rule there adopted, to contracts other than those which contained a promise to pay a fixed sum of money to be paid in the manner agreed on.

Upon the proofs disclosed in the bill of exceptions, the instrument declared on was not competent evidence under the common counts to warrant a judgment. The motion for a nonsuit was properly sustained and the judgment of the court below is affirmed, with costs.

ATTACHMENT.

500

[Superior Court of Cincinnati, June Term, 1851.]

THOMAS H. JONES v. HENRY A. EALER AND MILLS T. REDMAN.

Foreign attachment in debt.

Property was seized under a writ of attachment as the joint property of A. & B. It was claimed by C., D. & E., and on a trial of the right of property, found to be theirs. Another writ was then sued out against A. & B. and the same property seized again. *Held*, that the second seizure was not vexatious.

By Swan's Statutes, 88; it is "provided, that no writ of attachment, issued under the provisions of that act, at the suit of any person who is not a freeholder or a resident of the county, shall be served by the officer, unless the same shall be indorsed by some freeholder of the county as security for costs." *Held*, that that this was merely directory, and that service, without indorsement, was good.

A writ of attachment against goods was issued on the last day of the term, after the court had adjourned, and was made returnable forthwith and returned the same day. *Held*, regular.

The writ in this case was issued on the 30th day of May, 1851, at 5 o'clock, P. M., and was executed by the sheriff by the seizure of an unfinished steamboat and her machinery, of great value, as the property of Ealer, at six o'clock, and the writ was at once returned. It was a *forthwith* writ, returnable to the January term, 1851. That term had been actually closed at 3 P. M. of the same day, the journal signed by the judge, and proclamation made that the court then adjourned *sine die*.

The plaintiff is a non-resident of the state of Ohio, and upon the back of the writ was the following indorsement in the handwriting of the clerk, "John Ludlow security for costs. See precipe."

Another writ of the same kind, for the same cause of action, had previously been issued, but which, by mistake, only directed the sheriff to seize the joint property of the two defendants. Upon it, the same property was seized as the separate property of Ealer. Joseph G. Ealer, Charles M. Hammond, and George G. Ealer, laid claim to it, and a trial was had before a magistrate and jury under the statute, which resulted in a verdict for the claimants. Before the five days after verdict had expired, however, during which an order of restitution can not be issued, it being the period during which an appeal may be taken, the suit was discontinued, and the costs paid, and the present suit commenced. At the expiration of the five days, the magistrate issued his order of restitution, but the property had been seized on the second writ.

The defendant, Ealer, the sheriff, and the claimants, now appeared and moved to quash the writ, assigning these reasons:

1. This is a vexatious proceeding.
2. There was no security for costs indorsed on the writ.
3. This was a *forthwith* writ, issued in vacation, returnable to a term past.

And the sheriff moved for leave to amend his return, for the same reasons.

And the motion was argued by *G. E. Pugh* for the motion, and *N. C. Raad* and *F. T. Chambers*, *contra*.

HOADLY, J. One of the questions presented for decision in this case is of the first magnitude, and I have therefore delayed the decision, in order to give it a full examination and consideration.

The first question is, whether a motion to quash can be made, on the ground that the right to this property has been decided by the verdict of a jury to be in the present claimants. I think not. Their remedy is very clear. Upon notifying the sheriff of their claim, another trial may be had, where, if the verdict and judgment they have already obtained is good for anything, being between the same parties and upon the same subject matter, it will be evidence in their behalf, if not conclusive. There seems to be no more reason for quashing this writ on this ground, than there would be for pursuing the same course with an ejectment where there had been a previous judgment upon the same subject matter, and even less, because in that case, the previous action of the court is not evidence one way or the other. Besides, *non constat* but that the right of property has changed since the verdict. Relying upon their verdict, the claimants may have sold their interest to the defendants.

The second reason assigned is, the want of an indorser upon the writ as security for costs. The statute upon this subject reads thus 502 (Swan, 88): "Provided, that no writ of attachment, issued under the provisions of this act, at the suit of any person who is not a freeholder or a resident of the county, shall be served by the said officer, unless the same shall be indorsed by some freeholder of the county, as security for costs."

That the sheriff might have refused to execute this writ, there cannot be a doubt. The clerk's memorandum on the back of this writ was not an indorsement by procuration, as was argued. Ludlow gave no authority to any one to sign for him. It was merely the memorandum of a fact. It would not go into the record of the case. *Scire facias* would not lie upon it.

It is too late for the sheriff to make the objection; he has already elected his course, and the claimants have nothing to do with this question. Ealer and Redman must pay the costs, not they. Their property is not answerable; they are not parties or privies here. The motions by the claimants and the sheriff must, for this reason, be refused.

But the motion as made by Henry A. Ealer presents a more serious question. It is evident that any argument based upon the practice in the case of a summons or *capias* does not apply, for the language of the act regulating attachments is peremptory, "no writ shall be served," etc., while the practice act in the other case, simply directs that the writ shall be indorsed. Still, this is not a matter which affects the rights of the parties. The plaintiff may be compelled to give the security required. The object of the law may be attained, without destroying this writ. This statute is in character, precisely similar to the other; both are directory acts. The sheriff is liable for a violation of them, but his action is not void. I think, therefore, that upon this ground the motion cannot be sustained.

The last and most important question is, when did the January term of the superior court end for the issuing of writs?

The first division of this question which was argued was, as to the admissibility of parol testimony to contradict the teste of the writ. The weight of authority seems to be, that the proof may be given. *Golinson v. Farwell*, 7 Greenl., 370; *Trafton et al. v. Rogers*, 13 Maine, 315; *Allen*

et al. v. Smith, 7 Halstead, 160; *Boyden v. O'Deneal*, 1 Dev., 171; *Jenkins v. Cockerham*, 1 Iredell, 309.

There is a case to the contrary in 5 Pike's Arkansas Reports, and the reason given is that the law requires the true date to be inserted in the writ, and thus a conclusive presumption is raised that the teste is correct. But that rule is examined and refuted in the Maine and North Carolina cases which I have cited, and the weight of authority as well as of reason is decidedly against it. 503

Whatever the true rule may be, however, makes no difference in this case, for the teste here is right. The writ bears date the day it actually issued, and no contradiction by parol is proposed. It is claimed that by parol, it may be shown at what hour on the 30th day of May, the writ issued; that the day of the teste may be divided.

The question resolves itself into this; will the law notice fractions of a day in matters relating to the issuing of process? If it will, then the court will take judicial notice of the hour upon which it adjourned, and no proof is necessary. If it will not, there is an end to this controversy.

The principle upon which courts notice, in some cases, the fractions of a day, was discussed at length, in the argument. It was claimed that in regard to private rights and private liens, such as the date of recording mortgages, etc., fractions of a day would be regarded, but that a different rule governed public acts and judicial proceedings. And to this proposition were cited the case of *In re Welman*, 20 Vermont, 653, and *Follett v. Hall et al.*, 16 Ohio, 3. These cases go to this extent; that in regard to private liens, fractions of a day will be regarded, but no further. And the ground upon which the Ohio court base their decisions is, that the rule "that a day in law is not divisible is a mere fiction, only observed for the purposes of justice, and never adhered to where it would work mischief."

In *Johnson v. Pennington*, 3 Green's N. J. Rep., 188, the fraction of a day was regarded to give priority to one judgment over another, and the rule is thus announced: "Fractions will not be regarded when necessary to the due administration of justice."

In the matter of *Richardson et al.*, 2 Story, 571. The petition for relief under the bankrupt law of the United States was filed in this case on the 3d day of March, 1843, about noon. The act repealing that law, but containing a saving clause in favor of proceedings commenced before its passage, passed and was approved on the evening of the same day. It had previously been decided by Judge PRENTISS of the district of Vermont, that under such circumstances, the petition was filed too late, and one of the district judges in New York has established a contrary rule. With such diverse opinions in view, Judge STORY considered the question very carefully, and in holding that the petition was filed in time, pronounced the rule to be that "the doctrine that in law there is no fraction of a day, is a mere legal fiction, and is true only in respect to cases where it will promote right and justice." 504

Perhaps from an examination of all the cases, no clearer statement of the law can be made than this; that in general, no notice will be taken of the fraction of a day; but to subserve the ends of justice, the rule will be departed from. *Combe v. Pitt*, 3 Burr., 1423; *Small v. McChesney*, 3 Con., 19.

There is no reason why the rule should find an exception here, more especially as we shall presently see that service after, if the writ issued

before the adjournment, would be valid. In the case of a *capias* there would be very good cause for holding the issuing invalid, even if it occurred before the court adjourned. For the defendant, who is arrested upon a *capias* is bound upon the day of the return or the next day, to give special bail; and if he fail, the sheriff may be ruled to bring the body, or the plaintiff may take an assignment of the appearance bail bond. And any rule which should deprive a defendant of his right to have the court open, wherein to give special bail, for two days after his arrest, ought not to be regarded. Not only is it his right to give special bail upon the return of the writ, or the day after, but he is required to do it. But the cases of summons and attachment are different. No such requisition exists in either. The defendant in the latter case has three terms in which to select the course he will pursue, and no injury is done to him, by adhering to the rule.

In the case of *Mand v. Bernard*, 2 Burr., 812, decided by Lord Mansfield in 1759, the rule upon a very full and careful examination was settled, that upon a return day, a precept returnable that day, may as well be executed after the rising of the court as before. And this as well in the case of a *capias*, as any other writ. In that case, the service was at Rochester at 8 p. m., and it would seem to have been an arrest upon a *capias*, for Lord Mansfield says, that "in the reason of the thing, it is as impossible for the sheriff to bring the defendant *into court before its rising*, as before the end of the *day* of its rising, in all cases where the distance is too great to bring him up *within either time*; as in the present case, from Rochester, after seven or eight in the evening, which was the time when the process was served." In the course of this decision, four decisions of the King's Bench to the same effect were
508 cited, made in the second, eleventh, twelfth, and nineteenth years of George II, and the reporter adds at the end of the case: "So that the point is now settled."

In *Beal v. Longstaff*, 2 Wils., 372, the same rule was announced in the common pleas, in 1768. And since these decisions there has been no question upon this subject in England. *Robertson v. Douglas*, 1 Term. Rep., 191; *Haynes v. Jones*, 3 Taunt., 404.

I am aware that it will be said that in England writs are returnable to a particular day. But the answer is obvious. The command is, that the sheriff have the defendant in court, or summon him to appear before the judges, etc., on that day. If there be no court, he cannot make an appearance in, or be brought upon an arrest into court, any better than under our system.

That the same rule prevails in this country appears from Chief Justice Savage's decision in *Columbia Turnpike Road v. Haygood*, 10 Wend., 423. "In relation to the time of service of process and notices the law does not regard fractions of a day. For the purpose of ascertaining the priority of liens upon real estate, the true time of docketing a judgment or recording a mortgage, will be inquired into. So for the purpose of ascertaining the conflicting claims of creditors upon personal property, the true time of delivering an execution to a sheriff where several have been delivered on the same day will be inquired into. But in the service of process, or of notices or pleadings, in a cause, fractions of a day are not regarded."

The rule may then be considered settled, that had this writ issued on the 29th of May, it might have been executed at the time it actually was. If an attachment had issued against Ealer and Redman on the

morning of the 30th of May, before the actual rising of the court, and the sheriff held it and executed it, at the same time with this, would it not be absurd to say that one would be valid and the other void? This would be the merest chasing of shadows, straining at a gnat and swallowing a camel. For the service, the execution of a writ, is what affects the defendant's rights, not its issuing. If he is prejudiced, it is by the action under the precept, by the obedience to its command, not by the giving of command. And if a court cannot take notice of the fraction of a day in those matters which do injuriously or beneficially affect the party, much less should it in that which without service is a nullity, the mere issuing of the writ.

I feel the full force of the argument that a forthwith writ is supposed to issue out of a court then in session, and in case of an attachment, upon a showing made to the court. I know that the ordinary form of the writ is, "Whereas it has been made to appear to our superior court," etc. But if there is a court in session, for a defendant summoned at 8 p. m. to appear to a term, which is already time past, the judge having signed the journal and gone home, five hours before, so that he may be ruled to plead to a declaration be bound by an office judgment, and have damages assessed against him at the next term, there certainly must be a court open to issue writs. 506

It has long been well settled that in cases where rules expire a certain number of days after a term, the whole of the last day is included in the term. *Portland Bank v. Maine Bank*, 11 Mass., 204.

I think that every consideration of authority requires that this rule should be extended to the issuing of process. Motions refused.

INTEREST.

[Court of Common Pleas of Madison County, Ohio, May Term, 1851.]

C. B. BOWLER & CO. v. JOHN M. HOUSTON, ADMINISTRATOR OF R. HUTCHINSON, DECEASED.

A promissory note, payable on before, etc., containing a stipulation, that if the same is not paid within two months after the same becomes due, then to bear interest from date, is a good contract, and not against public policy, and if not paid within the time limited therein, interest from date can be recovered.

This was an action of assumpsit upon a promissory note for \$350, given by Hutchinson in his lifetime to N. Evans, and by him indorsed to R. Withrow, and by him indorsed to the plaintiffs, payable on or before the 1st day of January, 1848, and dated March 13, 1844, with a provision therein, that if the same was not paid within two months after it become due, then to bear interest from date.

The note was not paid until March, 1851, and the question presented to the court was, whether interest from the date of said note, to the time of its maturity, could be collected, it not having been paid within two months after it become due. The declaration contained an averment, that said note was not paid within the time limited in that behalf, by reason whereof, the said plaintiffs were entitled to receive and demand from the said defendant, interest from the date of said note. The defendant plead the general issue, and it was agreed that he should have 507

all the advantages under said pleas that he would be entitled to, had a special plea been interposed, specifically stating his defense.

Mr. H. W. Smith, for the plaintiffs, argued that the contract was valid and not against public policy. It was in no sense a penalty. *Richardson v. Mellish*, 2 Bingham, 229; *Horner v. Hunt*, 1 Blackford, 213; *Gully v. Remy*, 1 Bibb, 70; *Rumsey v. Matthews*, 1 Bibb, 242; Chitty on Contracts, 681; 13 Wendell, 587; 15 Johnson, 200; 7 Johnson, 72; 3 Black. Com., 436; 2 Atkin, 239.

Mr. Z. T. Fisher, for the defendant, contended that the interest was in the nature of a penalty; that as such it could not be enforced. It was against public policy. 3 Black. Com., 433; 2 Vernon, 289; 3 Atkin, 220.

By the court, **TORBET**, President Judge. Held, that the note in controversy, was a good contract, and that the interest from date could be collected. The contract was made by parties competent to contract, and entered into *bona fide*, and the court would not undertake to make a new contract for the parties. The English rule would seem to be against a recovery in this case, but the English authorities conflicted on this point. The supreme courts of Indiana and Kentucky hold a contrary doctrine, and the cases cited from those courts are clear and explicit, that a note like the one in this case, is a good contract, and the parties should be held to the obligations thereof.

Judgment for plaintiffs.

WILLIAM JONES v. THE STATE OF OHIO.

[Reported by WILLIAM LAWRENCE.]

The act relating to juries—Construction of—Drawing of juries—Challenge to the array.

1. The act of February 9, 1831, *imperatively* requires that the clerk of the court shall, in drawing from the box required by law to be kept, the ballots containing the names of persons returned by the township trustees as jurors, throw aside any ballot containing the name of a juror who has died or removed out of the township before the time of drawing for jurymen, and another name shall be taken out of the box in lieu thereof.
2. If the clerk omit to throw aside a ballot containing the name of any juror who has thus died or removed, the whole array of the jury may be challenged and set aside, and a new venire facias awarded.
3. When the array is challenged, it is competent to prove such death or removal of a juror.
4. If the court of common pleas on such challenge, and motion for a new venire, with proof of such death, or removal, refuse to set aside the array and order a new venire, it is error, for which the judgment will be reversed and the cause remanded for further proceedings.

This is a writ of error to the court of common pleas of Logan county. At the November term of said court, 1850, Jones was indicted for an assault with intent to commit a rape; was arraigned, and pleaded not guilty. A bill of exceptions, duly taken in the common pleas at that term, recites, that "this cause coming on to be heard and the jury having been impaneled, before being sworn, the defendant

challenged the array and in support of the challenge proved that said jury were drawn by the clerk," at the proper time, "and that before said jury was drawn, *Donn Piatt*, one of the jurors named in the venire, had removed out of Logan county and resided in Cincinnati;" for which cause the defendant challenged the array, and moved that a *venire facias de novo* be issued; which challenge and motion were refused and overruled by the court; to which defendant excepted.

The cause was submitted to the jury, who, on the evidence, returned a verdict of guilty.

No motion was made for a new trial.

The errors assigned are,

1. The court erred in refusing to defendant the privilege to challenge the array.

2. The court erred in ordering the jury to be sworn and to try the cause.

Mr. John A. Corwin, for Jones, plaintiff in error, referred to the act of February 9, 1831, relating to juries. Swan's Stat., 489, sections 4-8-16.

Mr. William Hubbard, prosecuting attorney, for the state.

The first section of the act relating to juries, passed February 9, 1831, prescribes the number of grand and petit jurors for each county; the second section prescribes the manner in which, and the time when, these jurors are to be apportioned among the several townships; the third section prescribes the manner of selecting jurors, their qualifications, and the duties of trustees and judges of election in relation thereto; and the fourth section provides that "the respective clerks of the courts of common pleas shall write the names of the persons *so selected*, upon separate pieces of paper," etc., proceedings to direct the manner in which, and the time when, the names are to be drawn. All of which requirements, so far as anything appears, were literally complied with. The jury were therefore drawn in strict conformity with the statute.

But it seems, that subsequent to the selection of jurors by the trustees, and prior to the drawing by the clerk, one of the jurors so selected and drawn removed to Cincinnati, and became a nonresident of Logan county.

The eighth section of the act referred to, provides that "if any person selected as a juror, as aforesaid, shall die, or remove out of the township, before the time of drawing for jurymen of any court where such person's name shall be drawn out, it shall be thrown aside, and another name taken in lieu thereof." 510

But a statute must receive a reasonable construction. Is it to be presumed that a clerk and sheriff, or either of them, can be aware of all the deaths or changes of residence that may transpire among all the jurors of a county? If there be such a presumption, then the above statute has been violated. But if it is to receive the reasonable interpretation that where the death or removal of a juror is *known to the clerk and sheriff*, his name shall be rejected, then the judgment of the court must be sustained; because it is not pretended that those functionaries possessed any such information.

It is to be presumed that instances of that sort will frequently occur; it is not strange that among so many persons, one or more should die; it is highly probable that removals will be made; but it is *not* probable that officers to whom the duty of drawing jurors is assigned will be aware either of deaths or removals; therefore, in the same section which pro-

vides that the names of absent or dead jurors shall be thrown aside, we find a clause expressly designed to prevent any inconvenience resulting from such deaths or removals; "and, in case there should not, by reason of challenge, or *otherwise*, be a sufficient number of jurors present to make up the pannel, the sheriff shall summon a sufficient number of talesmen to make up the pannel," Swan's Stat., p. 491, § 8. A similar provision obviates all difficulty in regard to the grand jury. *Forsythe v. The State*, 6 Ohio Rep., 19; *Reed v. The State*, 15 Ohio Rep., 217.

The latter case is not identical with that under consideration, but I am unable to see any difference in principle. If the rights of the accused are imperiled by the absence of one juror regularly impaneled, they must be vastly prejudiced, when not *one* alone, but *the whole pannel* are absent. Nor does it matter, as I conceive, whether the absence is induced by dismissal by the court, by a sickness, or by removal from the township or county. In every instance, the result must be the same. If the provisions of the statute be sufficiently ample to authorize the court to impanel a whole jury of bystanders, are they not sufficient to authorize the impaneling of a single juror? And if the former be not a sufficient
511 cause for challenging the array, can the latter be? Wharton's Crim. Law., p. 671.

RANNEY, J., delivered the opinion of the court.

Upon the facts disclosed in the bill of exceptions, the challenge to the array should have been sustained and the array set aside.

The eighth section of the act relating to juries, passed February 9, 1831, provides "that if any person selected as a juror as aforesaid shall die or remove out of the township before the time of drawing for jurymen of any court where such person's name shall be drawn out, it shall be thrown aside and other name taken in lieu thereof."

The sixteenth section of the same act provides "that when a petit jury shall be selected, drawn, or summoned contrary to the provisions of this act, the whole array of the jury may be challenged and set aside and a new venire facias be awarded returnable forthwith," etc. These provisions are *imeprative* in their character, and cannot be disregarded. The eighth section prescribes the duty of the officers in drawing a jury. It is unnecessary to say what would be the effect of a neglect to comply strictly with this section if the act did not declare the consequences. But the sixteenth section declares the consequences of a failure to pursue the statute, and this court has no power to say that the effect which the law has prescribed, shall not attach to a failure to comply with its requisitions.

536

MORTGAGES.

[Lucas County Supreme Court, 1851.]

Before Hitchcock, C. J., and Caldwell, J.

TIMOTHY L. MILLER v. BANK OF TOLEDO ET AL.

Mortgage of a chattel real must be recorded—Notice of chattel mortgage equivalent to filing.

[Reported by W. BAKER.]

The bill, answer and proof showed the following facts:

On the 25th October, 1848, William Kraus & Co. executed a mortgage to C. R. Miller (which was afterwards assigned to complainant), on a leasehold interest in forty-seven feet of ground in Toledo, the lease

running ten years, together with the buildings erected thereon by the lessee, the mortgagor, to secure a debt of \$4,000. This mortgage was executed after the form of a real estate mortgage and recorded in the record of deeds at the recorder's office.

On the 10th July, 1849, the Bank of Toledo obtained a mortgage from Kraus & Co., upon the same property to secure a debt of \$5,000, and filed a copy thereof in the town clerk's office, treating the former mortgage as not filed according to law. The bank took possession of the mortgaged property, and the bill was filed to foreclose and sell. It was proved that at the time the bank took their mortgage, they had full knowledge of the existence of the prior mortgage.

Held—1. That the mortgage to Miller was an instrument by which land was affected and incumbered in law, and came within the provisions of the law relating to the recording of deeds and other instruments of writing, and was properly recorded in the recorder's office. 837

2. The statute relating to mortgages of personal property, relates only to goods and *chattels* strictly, not to fixed property, like leasehold interest in lands or chattels real.

3. If it had been strictly a chattel mortgage, the complainant would still have the preference, notice of his rights to the bank being equivalent to a filing of the mortgage. They cannot be *bona fide* mortgagees, if they have actual notice of a prior mortgage at the time of the execution of the mortgage to them.

Decree for complainant.

W. Baker, for Complainant.

Fitch & McBain, for Defendant.

DIVORCE AND ALIMONY.

848

[Court of Common Pleas for Hamilton County, Ohio.]

Before the Hon. Robert B. Warden, President Judge.

FRANCES WRIGHT D'ARUSMONT v. WILLIAM PHIQUEPAL D'ARUSMONT
AND OTHERS.

Divorce—Alimony—Conflict of laws—French code—Allowance pendente lite.

T. Walker and *W. Y. Gholson*, appeared for the Complainant.

M. H. Tilden, for the Respondents.

This was a motion made for an allowance during the pendency of a suit in chancery, to enable the complainant to carry on the suit, and at the same time have a comfortable subsistence; and also, for an injunction and receiver.

At the time of filing this bill the complainant was a married woman, whose domicil was in Tennessee. She has since been divorced by a decree of the proper court of that state, as is shown by her supplement bill, on the ground of abandonment by her husband, and gross neglect of duty.

In her original bill, she claimed the interference of this court, as a court of equity, on the following grounds:

There was a large property (some \$80,000 or more), situated in this county, which her husband had settled in trust, without her previous

knowledge or consent ; which property was all originally hers, or the avails of what was originally hers ; but which had passed into the name of her husband, before creating the trust. This property consists of
549 loans on bond and mortgage, and of real estate purchased in foreclosing mortgages.

Being a resident of Tennessee, she could not seek her divorce here ; and she was advised that a decree of divorce and alimony there could only affect property there situated.

Therefore, to prevent the property here from being placed further beyond her reach than it already was, and to make it amenable to such rights as she might establish, notwithstanding the trust created by her husband, she filed this bill, claiming this property, or some part thereof, as equitably hers, and praying for an injunction, receiver and general relief.

In support of this claim, she alleges that the parties were married in France, in 1831, under the French law, by a French officer, in the presence of French witnesses (of whom General La Fayette was one), and with reference to a French domicile ; wherefore her proprietary rights are to be determined by the French law, although there was no antenuptial contract, inasmuch as all the property, wherever situated, came from her, he never having brought to the marriage, or since earned, a single dollar ; although, from her confidence in his honor, she allowed him to change the investments to his own name.

She further alleges, that in 1847, her husband, and their daughter, without any just cause, abandoned her in Paris, came to this country, arranged a settlement of the property here in trust, without her previous knowledge or consent, and have ever since lived separate from her, and refused all intercourse with her.

That in order to coerce her to execute certain deeds of settlement : First, of an estate in Dundee, Scotland, inherited after her marriage ; and, secondly, of an estate in Tennessee, known as the Nashoba estate, purchased by her before her marriage, and still standing in her name—the deed of trust made her execution of these deeds of settlement a condition of receiving any benefit under the deed of trust, and that under this coercion, and in misapprehension of her legal rights, she executed the required conveyances.

That the deed of the Tennessee property is not duly executed according to the laws of Tennessee ; and has not been recorded there, but remains in her possession, subject to the order of the court.

That she is now in a condition of almost utter destitution, although
550 the entire estate, here and elsewhere, is ample to support all, being not worth less than \$150,000.

That if her rights are not to be governed by the law of France, she is entitled to relief under the law of Ohio, and to be restored to some part, or all of the property which she brought to the marriage.

The bill does not call for an answer under oath, but an oath is volunteered. The case is not ready for final hearing, but affidavits have been filed by the complainant in support of some of her principal allegations. And the main question for the court now was, whether an allowance shall be ordered for counsel fees and subsistence, until a final hearing.

The motion for a receiver was waived ; and an injunction, to the extent asked, was not resisted. The only question, therefore, was as to the allowance *pendente lite*.

And on this question, the rule was claimed to be this :

Whenever a married woman has probable cause to litigate with her husband, as to property in contest between them, and has not the means of supporting herself in the meantime, and carrying on the litigation, a court of equity will order an allowance to be made to her, out of the contested fund, for both these purposes.

The reason is, the necessity of the case. She can not sue *in forma pauperis*; and without such allowance she cannot have her rights judicially investigated.

Unless, then, upon the present showing, the court is satisfied, beyond any reasonable doubt, that the complainant has not even a probable claim to relief in equity, an order will be made for the allowance now moved for. The case of *Snyder v. Snyder*, 3 Barbour's S. C. Rep., 624, lays down the rule in as broad terms as this.

In support of complainant's claim her counsel took the following positions :

1. This was a French marriage.

It was solemnized in Paris, before the French constituted authorities, and according to their forms, which could not have been done, unless one at least of the parties had his domicil there. (See Code Nap., art. 63 and 165.) It was the husband's domicil of origin, and if he ever acquired a domicil in the United States he lost it when he went to France before the marriage. A vague intention to return to the United States without reference to any specific time or place of sojourn, would not affect the French domicil. But the act of marriage states that both parties were domiciliated there, and this is conclusive. 551

Hence, the rights of the parties are to be determined by the law of France.

The property in possession of the parties at the time of marriage could only be affected by express contract, or by operation of law. If affected by neither, the rights remained the same as before ; if affected by either, then the contract or the law would show the nature and extent of the change of the right of property; and in any controversy as to that right, the contract or the law, as the case may be, must govern. Now, a removal of the persons or property to another jurisdiction could not change rights of property thus vested. As to property afterwards acquired in a new residence, it may be different; the law of the jurisdiction in which it is acquired may govern that, and the distinction has accordingly been taken. But in this case, we contend there has been no such change of residence, or at any rate no new acquisition of property. (See Meig's Rep., 342; Meig's Rep., 620; Story's Confl. Laws, § 48, 143—189, 191; 8 Paige, 261—5; 7 B. Monroe, 133; 4 Barbour's S. C. Rep., 295; 4 Barbour's S. C. Rep., 504, 518; 1 Woodb. and Minot, 7; 19 Maine, 293, 301; 3 Ves., 199, note; 8 Cranch, 253, 335; 3 Wheaton, 14; 5 Metcalf., 588; 1 Metcalf, 250.)

3. Under the French law, where there was no contract as to property, on a dissolution of the marriage (although there can now be no divorce, so as to enable the parties to marry again), the wife is entitled to be restored to all her property, or at least to half. (See Code Napoleon, art. 1387, 1393, 1400—1496; Story's Confl. Laws, § 130.)

4. This court will give full effect to the divorce in Tennessee, as much as if it had been granted in this state, and the decree will be conclusive of the facts found. (See 7 Ohio, Pt. 2, 238; 10 Ohio, 27; 2 Blackford, 407; Page on Divorce, 356.)

5. There can be no doubt of the jurisdiction of this court, to carry out the law of France as nearly as may be. (See 8 Paige, 261, 270; 3 Johns. Chy. Rep., 190, 211; 6 Barbour's S. C., 498; 7 Barbour's S. C., 226; 2 Sandford's Chy., 33.)

6. But without reference to the French law, this court can grant relief, in the shape of alimony under the Ohio Statutes. (See Swan's Stat. 294, §7; 44 Ohio L., 115.) For although a previous residence is necessary in applying for a divorce, it is not, in applying for alimony.

7. There is also a general chancery jurisdiction in such cases, independent of that conferred by statute. (See 1 Smedes and Marsh. Chy., 51, 65; 4 Hen. and Munf., 507; 4 Randolph, 662; 2 B. Monroe, 142; 3 Dana, 28; 4 Barbour's S. C. Rep., 297; 1 Johns. Chy. Rep., 364.)

8. In order to decree alimony, *pendente lite*, it is only necessary to present a probable case, one deserving of investigation. (1 Johns. Chy., 109; 1 Johns. Chy., 364; 1 Barbour, S. C., 430; 8 B. Monroe, 496; 2 B. Monroe, 145; 3 Barbour's S. C. Rep., 624.)

9. As to the deed of trust of September 17, 1847, it is void because executed with a view to a separation. (See Code Napoleon, art. 1443; 7 Yerger, 283; 7 B. Monroe, 133; 4 Dana, 141; 4 Johns. Chy. Rep., 501; 4 Paige, 516; 5 Paige, 509.)

10. The two deeds of the Dundee property and of the Nashoba property, are void because procured by coercion, and under a misapprehension of legal rights. (See 11 Ohio, 480, 488; 2 Barbour, Chy., 500; 9 Connect., 114; 7 Paige, 137; 4 Ohio, 358, 365.)

11. The deed of the Nashaba property is also void, on account of defective execution. It has no seal or acknowledgment according to the law of Tennessee. (1 Yerger, 429.)

12. This deed is also rightfully withheld by complainant in self defense. But she has now placed it in the custody of the court, and subject to the final decree in this case.

Counsel for respondents took the following positions:

1. Authorities cited against the motion for injunction and receiver. 5 Daniels Ch. Pr., 407, 408, 410, 427, 429; 1 Smith Ch. Pr., 560, 595, 628, 629; 2 Story's Eq. Jurisp., sec. 907, 908; *King v. King*, 6 Vesey, 172; *Leadworth v. Edwards*, 8 Vesey, 45; *Knight v. Duplesir*, 1 Vesey, 324; *Harding v. Glenn*, 18 Vesey, 281; *Howard v. Papera*, 1 Madd. R., 142.

2. *Allowance*. The defendants contended that an allowance could not be made, either, 1. As alimony; or, 2. As an exercise of chancery jurisdiction.

1. *Alimony*. The defendants contended that an allowance of alimony was the enforcement of the merely conjugal, personal rights and duties of the married parties, and that the case, so far as their object was concerned, should be considered and decided as a distinct case, wholly independent of that made by the bill, addressed to the court as a court of chancery: and that the court could not decree alimony now or at the hearing.

First—Because the court had no jurisdiction; in support of which, the following reasons and authorities were adduced:

1. The petitioner had not acquired a year's residence as required by statute; and it was argued that there was no difference between a petition for divorce, and a petition for alimony alone. Story on the Conf. of Laws, sec. 200, 203, 204, 214, 215, 216, 217, 218, 226, 230. Swan's Statutes, p.

294, sec. 7; *McCarty v. Decain*, 2 Russ. & Mylne, 614, 620; *Maguire v. Maguire*, 7 Dana, 186; *Person v. Person*, 2 Russ & Mylne, 614; *Jackson v. Jackson*, 1 Johns. R., 431; *Piatt v. Piatt*, 9 O. R., 37.

2. The petitioner, pending the proceedings here, had obtained a decree of divorce *a vinculo matrimonii* in Tennessee; and was not now a wife, so as to be entitled, on principle or authority, to apply for alimony. And it was contended that the defense to these proceedings, furnished by that decree, operating like a defense by way of plea *puis darcin continuance* at law, was equally conclusive under our statute, and upon general principle. *Piatt v. Piatt*, 9 Ohio Rep., 37; *Cooper v. Cooper*, part 2, Ohio Rep., vol. 7, p. 238; *Cooke v. Cooke*, 1 Barb. Ch. R., 639; *Meehan v. Meehan*, 2 Barb. Sup. Ct. R., 377; *Dean v. Richmond*, 5 Pick., 461; and citing also, 4 Metcalf, Mass. R., 303; 4 Rawle, R. (Penn.), 182; 2 Serg. & Rawle, 491; 4 Mass. R., 99; 2 Knapp. R., 226; 1 Blackf. (Ind) R., 364; 2 Vesey, Jr., 365; 1 Smedes & Marsh. Ch. R. (Miss.), 51.

But if the court should be of opinion that it had jurisdiction, then it was contended that a case was not made for its exercise.

1. Because the petitioner appeared to have the means of support independently of the husband. This point was argued on the evidence and the following authorities: *Worden v. Worden*, 3 Edw. N. Y. Ch. R., 387; *Logan v. Logan*, 2 B. Mon., 149; *Butler v. Butler*, 4 Litt., 205; *Bartlett v. Bartlett*, 4 Porter's R., 387.

2. Because the separation of the parties was by the act of the petitioner; and it did not appear, and was denied that she was abandoned by her husband, and it was denied also that the decree in Tennessee was evidence to prove an abandonment. *Finley v. Finley*, 9 Dana R., 52; *Butler v. Butler*, 4 Litt., 205.

3. Because, as the sole object of the suit was alimony, it was the duty of the court to inquire whether the petitioner could obtain a decree at the hearing, and to refuse an allowance if she was the party in fault; although it was admitted that if she were seeking a divorce also, the allowance might, in the exercise of the discretion of the court, be made, even if it seemed probable that she would fail at the hearing. And it was contended that, in point of fact, she was the party in fault. *Bissell v. Bissell*, 1 Barb. Sup. Ct. Rep., 430; 1 Barb. S. C. R., 64; 3 *ib.*, 624; 9 Dana, 52; 7 B. Mon., 424; 8 B. Mon., 124.

Second—It was claimed that the court, as a court of chancery, could not allow alimony in any case.

1. The grant of express power to allow alimony in certain cases, is a prohibition against the exercise of the same power in other cases; and if any impediment exists to its exercise under the statute, that obstacle cannot be removed by *supposing* the case merely to appertain to the chancery jurisdiction of the court.

2. Alimony is not a subject of chancery jurisdiction. *Olin v. Hungerford*, 10 Ohio Rep., 270; 1 Story Eq. Jurisp., sec. 1422, 1423; 2 Chitty Gen. Pr., 435, 462; 1 Fonb. Eq., book 1, chap. 2, sec. 6, p. 98; 1 Bl. Com., 441; *Prather v. Prather*, 4 Dessausure R., 33; *Julieneaux v. Julieneaux*, 2 *ib.*, 45.

3. Considering the case apart from the demands of the petitioner as wife, and as involving only her rights as the claimant of the property in controversy, it was denied by the defendant that the court had any power, *pendente lite*, to order money to be paid to one of the adverse parties by the other. And if this could be done in any case, it could only be properly done while the relation of husband and wife subsisted

between the parties, and in a case in which the court should at the same time pronounce upon the rights of the parties. It was denied that the complainant had any claim to relief in a court of equity; and the argument, on this part of the case, consisted in a reply to the grounds taken by the counsel for the petitioner, which was as follows:

I. It was claimed by the counsel for the complainant that the case should be governed by the French law; and that by that she was entitled on a dissolution of the marriage to a restoration of all the property owned by her at the time of the marriage, to which the defendants answered:

1. That the trust deed of September 17, 1847, was, so far as the daughter was concerned, a proper and valid exercise, under the French law, of the administrative powers of the husband.

555 2. That under that law, the property of the community could not be divided, until the community should by some means be lawfully dissolved, and that such dissolution had not taken place. That the divorce in Tennessee did not work a dissolution, because, when the marriage was celebrated, the laws of France did not authorize a divorce; that the cause for which that divorce was professedly pronounced, was not such as would lead to a judicial separation of persons under the French code, and that in point of fact no such cause was made out by the proof.

3. And that, even if the community claimed to have existed under the French code, could be considered as dissolved, so that the property of the parties could be divided, the mode of division would be by moieties.

II. It was denied, however, by the defendants, that the laws of the place of the marriage could be applied.

1. Because the law of the place of the marriage is a real (and not a personal) law, having no extra-territorial force, and not forming a part of the contract. Story's Conf. L., secs. 168, 171, 175, 176, 186; *Ordionaux v. Ray*, 2 Sandf. Ch. R., 33; *Lebritton v. Nouchet*, 3 Martin La. R., 60; *Saul v. His creditors*, 17 Martin R., 598; *Beard v. Bayse*, 7 B. Mon. R., 13.

2. Because the actual domicil of the parties, at the time of the marriage, was not in France, but in the United States, in contemplation of which the marriage, which was celebrated while the parties were *in transitu*, was contracted. Story on the Conf. of Laws, secs. 41, 44, 45, 46, 47, 48, 175 and 176; Ford's creditors, 14 Martin's R., 578; Story's Conf. L., secs. 160 to 163, 166, 168, 174, 192 to 194, 196 to 198.

3. The parties, after the marriage, removed to the state of Ohio, and during their residence there, by mutual agreement, vested their property in the husband. Story's Conf. L. secs. 55, 56, 59, 69, 102, 103; *Male v. Roberts*, 3. Esp. R. 63; *Thompson v. Ketcham*, 8 John R. 189.

III. It was claimed by the counsel for the complainant that she was entitled to relief under the act to amend the act in relation to divorce and alimony, passed March 2, 1846. Ohio Laws, vol. 44, p. 115. This proposition was denied on the ground:

1. That the case made could not be brought within the provisions of that act;

2. That the act was not in terms retrospective; and,

3. That if the act was intended to be retrospective, it was void, because property rights acquired by marriage are protected by the provision con-

tained in the federal constitution against state legislation to impair the obligation of contracts. *Lefevre v. Lefevre*, 10 Barr. (Penn.) R., 505; *McCellan v. Nelson*, 27 Maine, 129; *Swift v. Lace*; 27 *ib.*, 285; *Snyder v. Snyder*, 3 Barb. Sup. C. R., 621; *Holmes v. Holmes*, 4 *ib.*, 295. 556

IV. The general equity of the case was denied on all the grounds claimed by complainant.

1. As to the property embraced by the trust deed; it was contended that this property belonged to the husband in his marital right, having been reduced to possession by him, and that it could not be subjected to the equity of the wife to a settlement. *Udall v. Kenney et al.*, 5 J. C. R., 464; Same case, 3 Cowen R., 590; *Huber v. Huber*, 10 Ohio Rep., 371; *Ramsdell v. Craighill*, 9 Ohio Rep., 197; *Dixon v. Dixon*, 18 Ohio Rep., 113; *Bogue v. Krebs*, 6 Harr. & John., 37, and numerous other cases.

2. It was denied that, in point of fact, the marital rights of the husband were acquired in a manner which would enable the court to raise a trust in favor of complainant.

3. And the evidence was reviewed to show that none of the allegations of fraud made by the complainant were sustained.

4. And it was contended that the settlement of the property of the parties, by and in pursuance of the trust deed, was in itself just and reasonable, and substantially in pursuance of their understanding long previously existing; and especially, that it was essentially such as had been desired by the complainant herself.

Judge WARDEN delivered the following opinion:

This is a singular case. The record will embody the history of two lives, the portraiture of at least two marked and interesting characters, and the story of many important events. The bill, the answers, the correspondence, are a volume of moral lessons; the argument would make a book—a valuable book—of equity jurisprudence.

I shall never forget those mornings in the law library, those arguments, those studies, those eloquent appeals to enlightened thought and exalted feeling. All the questions were held up to view in every possible light; never, indeed, were such questions more clearly elucidated. And if, in the course of this opinion, many of the points in that almost perfect argument of counsel on both sides are really untouched and apparently unnoticed, it will certainly not be because any one of them has failed to engage my attention.

I have carefully considered all the arguments of counsel, and earnestly endeavored to do justice between these parties. 557

And now, after advisement, which has occupied every moment of the time left me by the pressure of public duties and the painful interruptions of domestic afflictions, I venture to pronounce the opinion I have formed.

The relief asked by complainant is, I think, in the nature of alimony. At least, the structure of the bill is such, that whatever relief may be appropriate, the pleader evidently contemplates that relief as a consequence of the divorce, which the petitioner declared her intention to seek in the proper court, pending the proceedings in this.

Regarding the bill as one for alimony, the counsel for respondent has ably and ingeniously argued that this court is without jurisdiction to allow such relief to a resident of Tennessee. We do not so understand the law. There are good reasons why it should not be so construed.

First, because such a strict and restrictive construction would confer on this court a crippled jurisdiction, and ought only to be adopted upon conviction that the language will not bear a construction more favorable to the complete administration of justice, and more harmonious with the objects of the legislation to which it belongs.

We are inclined to the opinion that alimony, in Ohio, can only be allowed for the causes pointed out in the statute; but if we resort to the strict construction adopted by counsel, we shall not have reason to restrict the remedy as claimed. The language so construed occurs in the seventh section of the divorce act. What is meant by "cases aforesaid?" If we do not apply it to the *first* section, to which shall it apply? To the second? That provides for applications for *divorce*. Now, how can a case in which the wife asks for alimony *alone*, be a "case aforesaid" (in which divorce is asked)? Nor is the application of the phrase more appropriate to the *sixth* section, which provides for residence as to alimony. In fact, every other section of the statute, except the *first*, relates to applications for divorces or the acts and proceedings of courts upon them; and although that first section defines the causes of divorce, it is the only one which can furnish the "cases aforesaid," in which it can be said that the petitioner prays for alimony *alone*. And if we go to the next section, which provides "that the wife shall file her petition under the provisions of this act, praying for a
558 divorce from her husband, the residence of her husband shall not be so construed as to preclude her from any of the provisions of this act," we shall find additional suggestions for doubting the correctness of the restrictive construction. It is claimed that the common rule, that the residence of the wife follows that of husband, applies to a case of divorce, and yet that the destitute wife cannot follow her husband into the courts where alone her wants can be supplied? I think the operation of the words "cases aforesaid" is to furnish the courts with the *causes* for which alimony may be allowed.

And I am the more inclined to such an opinion, as regarding the illustration of the difficulty attending the opposite doctrine yielded by the very case before us. The complainant declares that she will, pending these proceedings, seek a divorce in Tennessee, and will thereupon ask such decree as to her rights as she would be entitled to under the French code—that is, she asks alimony, and, as the rule for granting that, she appeals to the French code. Treating the case as one for alimony, it is clear that she can only have full relief in this court; and it would be strange, if she must first have her decree for alimony in Tennessee, and then come into a court of law or chancery in Ohio for the purpose of enforcing that decree.

But it is next objected, that the complainant cannot have alimony, because she is no longer a married woman. This is not the law in Ohio, notwithstanding the former opinion of complainant's counsel. Strictly, it is not law anywhere—for the sentence of divorce always precedes that of alimony, when both are sought by the same process. It is enough, however, that when the complainant filed her bill, she *was* a married woman, and that she is now merely asking a clear legal consequence of a divorce, obtained *pending these very proceedings, and with strict reference to them*.

The next objection is, that if the jurisdiction is established, the complainant has no merits. Let us examine this part of the case.

As I have already said or intimated, if the complainant has made out none of the causes, specified in the first section of the divorce act, she can have no relief in the nature of alimony, using the term according to the common definition, and excluding, for the present, all idea of alimony *pendente lite*.

But I am clearly of opinion that she has sufficiently and satisfactorily proved at least *one* of those causes. The words "gross neglect of duty," are not employed, but such is the substance of the allegation, and such is the effect of the decree, divorcing the parties, pronounced by the Tennessee courts. True, we are here met with the difficulty, that the French law does not allow divorces. But, the complainant does not lose her rights under the French law, because she has been divorced—all that can be said is, that the divorce is not, *as* a divorce, a title to such a restoration of property as claimed by her. In her bill, she states cause for divorce, substantially; and she there intimates that when she shall have acquired the right to sue in a Tennessee court for such relief, she will there ask for a divorce. Having been divorced pending this proceeding, she now demands alimony, and claims as such alimony, the enforcement of her rights under the French code. Now, her claims under the French code depend upon the question, whether there has been such a cause for the divorce in Tennessee, as would, under the French code, have supported a divorce for cause determinate. So that, although she may be entitled to alimony, she may still not be entitled to such alimony as would defeat the operation of the French law, if we shall find that the law of the place of the marriage contract governs us in this case. Let us examine, then, whether the law of Ohio, or the law of France, is to furnish us with the rules for ascertaining these parties' rights.

In the condition in which I am now placed, I cannot so fully state the reasons for the opinion I have formed on this subject, as in other circumstances I would be disposed to do. Without reviewing the authorities in this place, and confessing that attentive consideration of the case cited has not entirely relieved my mind of doubt, I venture to state these propositions.

There is a distinction between the construction of ordinary contracts, and that of the marriage contract, so far as propriety is concerned.

In either case, however, the *intention* of the parties ought to govern in any suit between the parties alone, or between them and such as have not the protection given to innocent purchasers or creditors, or the like.

Where the parties agree that, notwithstanding any change of residence, the property acquisitions shall be governed by the laws of the state where they marry, that agreement ought to be respected in the settlement of all questions between the parties, *and in all courts*, unless the rights of innocent creditors or purchasers would thereby be affected, or unless such would contravene the laws or policy of the state in which such relief is sought.

The parties may so agree, not only by written articles, but by merely verbal or implied contract.

In the absence of such written articles, verbal agreement, or implied contract, the mere fact of marrying in one country furnishes no presumption that the parties agree to govern all their property acquisitions by the law of that place, irrespective of all changes of domicil.

Upon the question of fact, whether there *was* any such agreement, it is admitted that there were no written articles of such a contract, and, under the rules of law which I understand to govern allegations and de-

nials in a chancery cause, I have no proof, which can now be considered, that the parties had any agreement on the subject. It is *possible*, however, that the complainant may prove what she claims on this subject, and the only effect of its being for the present *unproved*, is to leave for future determination the question whether, supposing the plaintiff entitled to alimony, the French code or the common-law is to be regarded in determining the relations of the parties as to their property. In this state of uncertainty I find it necessary to express any opinion I may have formed as to the settlement of property questions under the foreign law, in cases like this.

I am equally relieved in the question, whether the complainant has merits requiring the allowance of alimony as a consequence of her divorce. The decree of the Tennessee court finds such facts as prove the existence of one of the causes for alimony known to our law, viz., *gross neglect of duty*. Happy I esteem myself, in being thus discharged of the most delicate and difficult task that could be imposed upon any court.

We have, as I have said, been called upon in this strange case to review the history of two lives, and the opening of another. Two lives that are closing in suffering and sorrow—another, the happiness once of the others, the solicitude now of both! We have been looking upon a fearful picture, and I breathe freely once more, when I become certain that it is not my painful duty to copy such a portraiture of broken ambition, disappointed hope, and lost happiness. I congratulate myself that I am released from the responsibility of saying *what* demon it was that turned all this love to hate, and their home into hell—I dare not say, if I had to meet such a responsibility, whether the picture painted by either
561 party, would be such a one as I should draw, in the light supplied by the history of those sorrows, contained in the evidence before me.

I hasten to dispose of the remaining questions. It is said the complainant, though she may in the final decree be entitled to alimony, ought not to have any allowance pending these proceedings, because she is now freed from the disability of coverture. We do not think that a good reason for refusing the allowance; she was married when she filed the bill; she is aged and infirm; she is as much entitled to support and maintenance now as she will be on the final hearing. It is further objected to the allowance, *pendente lite*, that she has already the means of living decently and comfortably. We do not find so from the testimony. I am of opinion, that looking to all the circumstances of the case, I could not do better than to direct payments analagous to those provided in the trust deed. The respondents can hardly object to such a course—for such in substance is their own arrangement—and the only difficulty suggested is that the trustee, *as such*, and upon his own responsibility, cannot make payment until the complainant surrenders the deed to the Nashoba estate. From this difficulty, the order here made will relieve him, for it will be as *alimony*, and not as money paid under the trust deed, that he will deliver to the complainant sums equal to her provision in the trust deed.

We here intimate no opinion as to the force of the trust deed. The parties stand, in allegations and proof, so opposed, that it would be wrong now to settle that question. Nor shall I make any order, for the present, as to the delivery of the Nashoba deed; that will depend upon the disposition of the trust deed.

I have not found it necessary to decide upon the case considered as one in which the husband is trustee for his wife. That is also a part of

the case in which the bill and answer are at issue, and the proof does not yet satisfactorily appear. But here also the complainant has probable cause to litigate, and here also I find reasons for making such an allowance as I have already intimated I should direct.

Briefly, then, I am satisfied that this court has jurisdiction of the case, first, as one of alimony; and, secondly, as one of the nature just indicated. I am further satisfied that she has probable cause to litigate with her husband on either of these questions, and I allow her alimony, *pendente lite*, and till further order, in sums analagous to those provided in the trust deed, thus relieving the trustee from any possible difficulty of paying *under that deed*, until he has secured the Nashoba conveyance, and postponing the determination of all other questions until full proof and further advisement. 562

I cannot see any necessity for either injunction or receiver at present, except so far as counsel appear to have agreed.

An order may be drawn for my signature in accordance with this opinion.

NOTE—The court ordered \$800 to be paid to complainant now; one-third of the income of the property here to be paid quarterly hereafter, and a counsel fee of \$800 on each side.

DANGERS OF NAVIGATION.

SAMUEL M. HAUGHTON, FOR USE, ETC., v. THE STEAMBOAT MEMPHIS.

Before Judge Key, Commercial Court of Cincinnati.

Evidence—Dangers of navigation—Costs.

This was an action of *assumpsit*, brought on two bills of lading for damage done to goods shipped on the Memphis, on her passage from Cincinnati to New Orleans, and was tried by the court without the intervention of a jury. The plaintiff, to show the manner of the loss, offered to read the protest of the captain made on the day on which the leak causing the damage happened. The defendant objected to its competency; but the objection was overruled. The plaintiff also offered duly certified copies of entries made in the books of the portwardens of New Orleans, to show the condition of the goods on their arrival at New Orleans, the entries being made immediately after inspection by the portwardens. These being objected to, the court ruled them out, holding that portwardens are not such officers that entries in their books are evidence.

The evidence then showed that the goods were damaged by the plug coming out of the cold water pipe, and letting water into the hold. That at Madison, the pipe being frozen up, the plug was removed and the ice knocked out; that the plug was then driven back into its place, but no fastening was used to keep it tight. That many steamboats have the cold water pipe stopped in the same way, by having the plug simply driven in; but that many have a flange put on the end of the pipe, and marline or strong twine fastened around it tying the plug in; 563 others have it fastened in by an iron clasp, and others have a stanchion just in front of the pipe, so that a wedge driven between it and the pipe keeps the plug in place. The engineer testified that in such cold weather as the boat experienced at Madison, frost may expand the plug; and that

the weather soon became warm enough to thaw it, and thereby, probably, diminish its size.

The defendant argued that the leak was owing to natural causes and was a danger of the navigation. The court held that the phrase "dangers of the navigation," is of the same import with the phrases "perils of the river" and "perils of the sea," and means at least an unavoidable accident. But the evidence showed that the accident could have been avoided by using such precautions as actually are used on many boats. It was, therefore, not a danger of the navigation, and the carrier was liable for the loss resulting from it.

The plaintiff, though recovering less than \$100, claimed judgment for costs, as well as damages, on the ground that the losing party pays costs, except when otherwise provided by statute; that the statute in Ohio says, "if any person shall prosecute an action for any liability of which any justice of the peace shall have jurisdiction under this act" (the act of 1831), and shall obtain verdict or judgment for less than \$100, without costs, then he shall not recover his costs, and that justices of the peace had not jurisdiction of this liability under that act nor until long after. The court overruled the argument and gave judgment for each party to pay his costs.

569

EVIDENCE OF PARTIES.

[Supreme Court for Crawford County, June 20, 1851.]

TOLMAN V. HEFFLEFINGER.

HITCHCOCK, C. J., *Held*, That where a party is called as a witness under the provisions of the act of March 23, 1850, 48 Ohio Laws, 33, his evidence cannot be restricted to a particular branch of the case; he becomes a witness in the whole case, and has a right to disclose facts favorable to himself as well as to the opposite party.

WHAT IS EXEMPT FROM EXECUTION.

• [Supreme Court, Wyandot County, June 21, 1851.]

Before Hitchcock, C. J., and Caldwell, J.

HENRY W. MUNSON V. SAMUEL GASHORN.

CALDWELL, J., *Held*, That the act of March 4, 1844, 42 Ohio Laws, 28, authorizes an execution debtor engaged in the business of agriculture to select a work horse or mare without regard to its value; and that in making the selection he is not restricted to an animal worth \$50 or less.

MECHANIC'S LIEN LAW—CHANCERY.

[Wyandot County.]

ZIEGLER V. LEIBOLT ET AL.

HITCHCOCK, C. J., *Held*, That chancery cannot liquidate an account against the owners of a building, under the "Mechanic's Lien Law," and enforce the lien against the owner's equitable interest in the premises. The provisions of the statute, 41 Ohio Laws, 66, require that the claim should be enforced by suit at law.

CONVEYANCING.

42

[Knox County, Ohio, Supreme Court, September Term, 1851.]

Before Judges Spalding and Ranney.

[Reported by C. H. SCRIBNER, of Mount Vernon.]

CATHERINE SPRAGUE v. ELIJAH CONVERSE.

Petition for dower. *Held*, that a certificate by a justice of the peace, under the act of 1831, that "the husband and wife had acknowledged the signing and sealing of a conveyance of real estate to be their voluntary act and deed; and that he had examined the wife separate and apart from her husband; and that upon such examination she declared that she voluntarily signed and sealed the same of her own free will, and that she was still satisfied therewith," bars the dower estate of the wife, although such certificate does not set forth that the contents of the instrument were made known to her. *Chesnut v. Shane*, 16 Ohio R., 599; *Stevens v. Doe*, 6 Blackford's R., 475. 43

WAYNE COUNTY BANK v. ABERNETHY AND OTHERS.

Certiorari. *Held*, that where satisfaction of a judgment has been entered through mistake, such entry may be vacated and cancelled upon motion.

RIGBY & SON v. TAYLOR & HOGG.

Error. *Held*, that a warrant of attorney to confess judgment for a certain sum and interest thereon, with exchange between A. & B. did not authorize the taking of a judgment which included exchange.

MORTGAGE OF STEAMBOAT.

88

[Supreme Court of Ohio, April Term, 1851, Hamilton County.]

Before Hitchcock, C. J., and Spalding, J.

JOHNSON AND ANOTHER v. ROGERS & SHERLOCK.

Held, That the claim of mortgagees on a steamboat, though prior in date, is subject to claims against the boat under the statute making the boat liable for debts contracted by the agents of the boat, and that the statutory debts must be first paid.

Bill in chancery. The facts are substantially stated in the opinion of the court.

SPALDING, J. The facts set forth in the bill and admitted in the answer are as follows: In 1847, McFall & Smith became the purchasers of the steamboat Ben Franklin No. 7, from the defendants, Rogers & Sherlock, for \$10,000: of the purchase money they paid in hand \$5,000, and to secure the residue executed three promissory notes for \$1,667 each, payable in three, six and nine months, and signed by McFall & Smith, with the present complainants. At the same time McFall & Smith executed a mortgage of the steamboat to the vendors, Rogers & Sherlock, as additional security for the payment of the notes. A bill of

sale was made for the boat, and she passed into the possession of the purchasers, McFall & Smith, who ran the boat on the Ohio and Mississippi rivers. At the time of the sale she was stated to have been wholly free of any incumbrance in the shape of liens; but some time after, debts were contracted for the use of the boat which became liens on her under the law of Ohio; and in 1848, by virtue of a warrant issued from the superior court, the boat was seized, debts came in against her to the amount of \$5,000, and she was subsequently sold, under the proceedings in that court, for \$3,800, and all the avails of the sale distributed among the creditors who held liens under the watercraft law. During that time Rogers & Sherlock had omitted to file their mortgage in the office of the recorder of Hamilton county, not supposing it to be necessary. They did not interpose any claim under the mortgage for a share of the avails of the boat when sold. The present complainants urged the court that they should be absolved from any liability on these notes, for the reason that the defendants by their negligence had lost to them the security of the mortgage, of which they should have had the benefit as the sureties on the notes. And the question brought to our consideration is this, whether, when a steamboat or canal boat is sold, and a mortgage taken to secure a
89 portion of the purchase money, the subsequent expenses of the boat when running will attach a lien to the boat when seized for the same, which will override the mortgage thus executed. Because if they will, the claim of the present complainant falls to the ground, for Rogers & Sherlock had no protection against those expenses of the boat in their mortgage, even if it had been duly filed in the recorder's office. We take it, that this question has been settled by the supreme court of this state substantially in two or three cases, and directly in the case of *Prevost et al. v. Wilson et al.*, in the 17th volume of Ohio reports. But if the question was before us *de novo* we should have no hesitation in saying that the mortgage on the boat would be no screen against the expenses of the boat when running. It was the object of the legislature to enable a mechanic who labored on the boat, or any party supplying her with necessaries, to retain a lien on her superior to that even of any owner or any mortgagee. We cannot see why a mortgagee of a boat who suffers her to run should have any right to be protected, superior to those of the *bona fide* holder without a mortgage. If we were to say, where a boat is to be sold and a mortgage taken, that that mortgage should operate as a screen to protect her from any other expenses when running, we should defeat, to one-half of its extent, the operation of this statute. An individual who sells a boat, or who for a debt due him takes a chattel mortgage on a boat, may protect his mortgage if he will keep his boat in his possession; but the moment he suffers her to run on the river he gives a license to those in charge to contract debts on the face of the boat, which shall attach a lien superior to his mortgage. If we entertained any doubt on the subject we should have reserved the case for the Court in Banc, but the exact principle here contended for has already been decided in the case reported in the 17th volume of the Ohio reports. The bill must be dismissed with costs.*

Messrs. King & Anderson, for Complainants.

Messrs. Coffin & Mitchell, for Defendants.

* After the filing of the bill in this case, and before the hearing, application was made to Judge Caldwell, at Chambers, for an injunction, restraining Rogers

CRIMINAL LAW.

109

[In the Cuyahoga County Court of Common Pleas.]

OHIO V. HORACE L. BROOKS.

Indictment for murder—Obstructing railroad track.

On the close of the arguments of counsel on the 30th of October, 1851, Judge BLISS, the president judge, delivered his charge to the jury in writing. After cautioning the jury not to suffer their judgment to be influenced, either by the shocking atrocity of the offense, by their feelings on the subject of capital punishment, or by the feelings expressed by the defendant and others that as the company had the benefit of their labor and supplies, it should see that they are paid for them, or at least that it should not pay in full the irresponsible contractors, without taking some security against their defrauding the builders of the road, Judge BLISS proceeded.

The defendant is indicted under the following statute :

" Be it enacted, etc. That every person who shall wilfully and maliciously remove, break, displace, throw down, destroy or in any manner injure any iron, wooden or other rail, etc., * * * or who shall wilfully and maliciously place any obstruction or obstructions upon the rails or tracks of any such railroad, shall, on conviction thereof, be punished by imprisonment in the penitentiary not exceeding three 110 years nor less than one year: provided, however, that if any person shall by the commission of either of the aforesaid offenses, occasion the death of any person or persons, the person so offending shall be deemed guilty of murder in the first or second degree, or manslaughter, according to the nature of the offense; and on conviction thereof shall be punished as in other cases.

This section creates a new offense only in its first provisions. So far as the crimes of murder and manslaughter are concerned, they are left to be governed by the same rules that appertain in other cases. It then becomes necessary that I call your attention to the general and abstract character of the offenses charged, and to the principles which apply in all cases of murder and manslaughter. I will afterwards consider the facts of this particular case.

The defendant stands charged with three offenses :

1st, murder in the first degree, which in general is an unlawful killing purposely and of premeditated malice.

2d, murder in the second degree, which is an unlawful killing purposely and maliciously, but without deliberation and premeditation.

3d, with manslaughter, which is an unlawful killing without malice, either upon a sudden quarrel or unintentionally while the slayer is in commission of some unlawful act.

The distinction you perceive between murder in the first and second degree, consists in the presence or absence of deliberation and premedita-

& Sherlock in the collection of the notes. The motion was fully argued before him and the injunction refused, Judge Caldwell holding that the Court in Banc had settled the question, as now held by Judge Spalding.

A bill had been previously filed in the commercial court of Cincinnati, and like application made for injunction, which was refused for the same reasons.

tion. No specific time can be given during which the act must be premeditated. It may be but for a very short period. But there must be reflection and planning for some time, however short. The determination must be cool and deliberate, not formed upon a sudden impulse, but in the exercise of the clear reason.

In order to constitute murder in either degree, there must, with a few specified exceptions, be a purpose to do the deed, a design to kill distinctly formed previous to or at the time of the commission of the offense, and the act must be done with malice.

In the present case there is no evidence that the prisoner had any ill will toward the deceased or any special design against *his* life. Neither is such ill will or design necessary to constitute the crime of murder. If one person attacks another with intent to murder, and by mistake or accident kills a third person, the crime is as complete as though the intent had been carried out. The depravity or malice is the same, the design to kill the same, and the crime the same. So if a person shall

111 wantonly perpetrate an act which shall greatly endanger life, though of whom he knows not, knowing and reckless of its consequences, and death results, it is murder. The malice is greater if possible than though directed against some particular person, and the design is inferred from the fact. Men are presumed to know the natural and necessary or probable consequences of their acts, and it is a presumption of common sense that they design what they know will follow.

The most common illustration given in the books is the case of a man who wantonly shoots into a crowd, or throws timber or brick from a building upon the the heads of passers by without any ill will or design against any particular person.

By the law of England a man may be convicted of murder under some circumstances without any intention to kill. Sir M. Foster, as quoted by Roscoe, says, "if an action unlawful in itself be done deliberately and with intention of mischief or great bodily harm to particular individuals, or of mischief indiscriminately, fall where it may, and death ensues *against or beside the original intentions of the party* it will be murder." Foster, 261, Roscoe, p. 653.

In illustration of this, Roscoe quotes further, "if a person rides a horse known to be used to kick, amongst a multitude of people, although he only means to divert himself, and death ensues in consequence, he will, it is said, be guilty of murder." Page 654.

But the law of Ohio goes not to that extent. The statute which defines all crimes, dispenses with the guilty purpose only in the instances mentioned in the first section of the act of March 7, 1835, "that if any person shall purposely," etc., "or in perpetration or attempt to perpetrate any rape, arson, robbery or burglary, or by administering poison or causing the same to be done, shall kill another, every such person shall be deemed guilty of murder," etc.

In all other cases where death results from unlawful and mischievous acts, there must be a purpose, an intention to kill, or there is no murder. This does by no means conflict with the instances just given, where men are held responsible for the fatal consequences of their wanton acts. Though murder cannot exist without the purpose to kill, yet that purpose is justly presumed from acts that would necessarily or naturally destroy life. This presumption is not an irresistible and conclusive one, which cannot be rebutted, but an inference of reason and experience, which may be modified or entirely destroyed by circumstances.

I have said that malice is an essential ingredient of the crime of murder. The legal signification of the term is not the common one. Malice is not *hatred* or *envy*, though it frequently includes both. It is not anger merely, for passion sometimes rebuts the presumption of malice. It is depravity—it is wickedness of heart, loving mischief, and usually cool and capable of calculation and purpose. Though malice be thus essential, it is not necessary expressly to prove it. It will ordinarily be inferred from any killing from a formed design without lawful authority, or sufficient provocation or excuse. 112

Manslaughter may be an intentional and unlawful killing without malice, upon sudden heat, or an unintentional destruction of life while the slayer is in the commission of some unlawful act, other than rape, arson, robbery or burglary. The distinction then between it and murder is, in the one case, the absence of malice, and in the other the absence of the intention to kill.

In bringing your attention to this particular case you will find that it resolves itself into three general inquiries: 1st. Was the death of Westland occasioned by wilfully and maliciously placing the obstruction upon the railroad track? 2d. Was it placed there by the defendant? and 3d. If so, of which of the offenses charged is he guilty?

1st. Upon the first inquiry you will probably experience little difficulty. On the 7th of May last, about half-past eight o'clock in the evening, a three inch, eight foot oak plank was found placed, one end against a tie under the projecting end of a plank crossing; the plank resting on the next tie, so as to project the other end about two and a half feet above the track, toward the approaching train. The end of the plank struck the engine under where the deceased was standing, threw him out forward on the track, when he was run over and instantly killed. A plank could not be placed in the position in which the one in question was found with other than an evil intention, and that the death of the deceased was occasioned by it being so placed you will doubtless find clearly established.

2d. The second is the main inquiry in the case. Did the defendant place the plank in the position where found? The evidence relied upon by the state to establish the affirmative is entirely circumstantial. I need not say to men of your observation and experience that circumstantial testimony may be of the most satisfactory character, that it may with more certainty demonstrate a fact than the oath of an eye witness. But the investigation of this class of testimony requires more time, more patience, the most perfect coolness, and minds of a thoroughly practical and somewhat logical character. 113

The circumstances themselves must be clearly proven; they must all point in the same direction, and together must be irreconcilable with any other reasonable hypothesis. The inference which they compel, should not be that the defendant might have done the deed, but that he actually did do it. In arriving at the conclusion we but apply the well known principles of inductive logic. Indeed, the whole administration of law is but the application of the principles of justice under the direction of the reason to the relations of men.

What then are the circumstances relied upon by the prosecution to establish this fact against the defendant?

While for convenience of deliberation I will group them under three general heads, I shall not attempt to show how each bears upon the question, or recapitulate the testimony relied upon as establishing them.

In thus commenting on testimony there is always danger without great care, of trenching upon the proper province of the jury. I will therefore recapitulate these circumstances, leaving the evidence establishing and rebutting them to be applied by you, and the conclusions to be drawn from them, if you find them established, to the deductions of your own reason.

1st. To identify the defendant as the one who put the plank upon the track, the state relies first upon his threats and his continued depredations upon the road.

Upon the testimony introduced to sustain this point, the defendant by his counsel has asked us to charge as follows :

"That no testimony in reference to the cutting of the derrick, or the putting of the tie on the track, 22d February, or the rail on 5th March, or burning of wheelbarrows, or concerning any other act of defendant against R. R. Perine, or Chamberlain & Co., can be taken into consideration in determining the fact that defendant put the obstruction on the track on the 7th May when Westland was killed. That the fact of his putting the obstruction on the track the 7th May, must be found by independent testimony, and until this fact is found by other testimony, the jury cannot consider the other testimony at all.

"This testimony is only to be considered to determine the degree of the offense, that is the malice with which it may have been committed, after by other testimony it is shown that defendant put the obstruction on the track the 7th May."

114 With this request we cannot comply. Whoever placed the obstruction on the track, must have entertained feelings of deep hostility to the road or the railroad company. The act could not have been dictated by ill feelings toward the deceased or toward any one in his company, for the circumstances were such that it could not have been known that he or they were at that time passing over the road. It becomes important then to inquire whether the person to whom other circumstances point entertained those feelings. That knowledge will supply the motive, an important link in a chain of circumstantial testimony. Whatever may be the diverse theories of speculative philosophy, we know that practically men do not act without a motive, and when circumstances unequivocally point to a particular person as the perpetrator of an offense, we still hesitate in believing him guilty, until we find some inducement, some motive to prompt the act.

The testimony showing the hostile feelings of the defendant and his continued acts of hostility toward the road, are to be considered by you, as well to show that he is the person who placed the obstruction on the track, as the malice which prompted the act. Alone such testimony would be entitled to no weight. The commission of the offense must be clearly shown by other testimony; circumstances must point to the defendant as the guilty person, and then you may consider his acts and declarations, though they do not pertain to the specific offense charged, so far as they indicate a feeling that will supply a motive for the deed, or show a continued purpose to do it.

In order to meet the testimony under this head, the defendant has sought to show that others than himself in the same neighborhood had made similar threats; that the feelings of a large number of people were, for supposed delinquencies of the principal contractors, strongly excited against the road. This testimony you are to consider, and seriously inquire whether there is any probability that the offense was committed by

any one other than the defendant, or whether these as well as other circumstances point equally to others as to him.

The defendant has also sought to impeach the principal witness brought by the state, to show his various depredations on the road. It is for you to judge whether he has succeeded in that attempt. If from the manner of the witness, from the motive influencing his testimony, or from want of character for truth among his neighbors, you deem him not a credible person, you will receive his testimony under the rules 116 that ordinarily apply to an impeached witness. Such testimony is not to be rejected entirely, still it is always deemed unsafe to find any fact upon that alone. There is no different rule prevailing in the case of a witness, than the one we naturally observe in our ordinary intercourse with mankind. We do not act upon information alone of a man notoriously unreliable. Yet such a person may tell us the truth, and if his story is corroborated in whole or in part by others, we believe it and act upon it. If then you find that Harrington Brooks is successfully impeached, you will inquire how far he is corroborated by the other witnesses, and if you find him unsustained, his testimony ought to be rejected. But if you find him sustained, receive it, if you believe it true.

2. The prosecution relies secondly upon the recent tracks of the defendant, found in the first ground that could receive an impression, running in a line from the point of collision to his house, or the usual road to his house. Connected with this, and only important in that connection, is the conduct of defendant's dog. He is represented as coming along the road from toward the defendant's crossing to the point of collision, as if scenting a track; that he smelled about in different places at and near where the obstruction was placed, and without noticing any that were standing around, started in a direct line, still appearing to follow a track, across the meadow toward the bank of the creek by the butternut trees and disappeared. This was in the evening, and a short time after the collision, and but little longer after the plank must have been placed in the road. Early in the morning search was made for tracks, and, as is claimed, those of the defendant were found in the dry and sandy bed of the creek, running as before mentioned, and commencing at the point on the bank where or toward which the dog had disappeared. The tracks of the dog are also found in and near the tracks claimed to be the defendant's, and running along them in the same direction. Firstly under this head you will decide whether these tracks were recently and actually made by the prisoner. Upon this point much time has been consumed, both in the examination of witnesses and in the argument. I can add nothing that will aid an intelligent conclusion. You must be satisfied that they were made on the night of the collision and by the defendant. If the testimony fails to convince you of those facts, the conduct of the dog is of no importance whatever. That he was scenting some track upon the road and from it, is probable, but that it was his master's, will not be presumed in the absence of proof. If, however, you find it clearly established that these tracks were the defendant's, and that they were fresh when discovered, not only do they afford, unexplained, a strong circumstance 116 against him, but they give some consequence to the conduct of the dog.

3. The state also relies upon the conduct of the prisoner subsequent to the offense. His absenting himself while the other neighbors gathered around the melancholy scene, though he was within sight and hear-

ing, his declarations of ignorance the next morning at the plank road gate, at the court house, and to Mr. Adams, and the conflicting character of those declarations, are all circumstances to be considered by you in arriving at a conclusion.

The fact that the prisoner was near the scene of the disaster can hardly be called a circumstance against him, as that was his home. He was properly there, and no inference from that fact can be drawn. Still the location of his residence with that of others is a matter for consideration with reference to the time that elapsed after the approach of the train was announced by the whistle. The offense must have been committed by some one who either resided, or for the time being was lying near the place.

I have thus grouped the various circumstances relied upon to establish the principal fact charged. If I have omitted any, your memory will supply them.

Bring, then, these circumstances to the test heretofore laid down. Are they clearly proven? Such as are not, reject, and retain only those thus established. Do these circumstances all point to the defendant? Any of them which apply to others as well as him, or that do not tend to connect him with the act, are also to be rejected. Having thus sifted them, take them, or those that remain, together, and what is their language? Do they point with a moral, a reasonable certainty to the defendant, and make him the guilty man? Can you reconcile them with any other rational supposition? If you can, you are bound to do so. But if in the exercise of your cool reason, you find it impossible to reconcile these circumstances with any other conclusion, than that this plank was placed upon the track by the defendant, you are bound to find that fact against him. Do they prove that the prisoner did the deed? Do they prove nothing else? The caution you are bound to exercise, does not authorize the suspension of common sense, by the creation of fanciful doubts; it does not require you to ask whether by some possibility
117 the natural inference from the facts, may be an incorrect one; but it requires you to apply, rather than reject, the rules of reason and experience.

If you shall fail to find this main fact for the state, your duties will end, and you may acquit the prisoner.

But, if on the other hand you find this fact against the defendant, there remains another and most weighty question to pass upon. Of what offense do you find him guilty? Is it murder in the first degree, murder in the second degree, or manslaughter?

We have given you the characteristics of each offense and the distinction between them. You have seen that in order to constitute murder in the first degree so far as this case is concerned, there must be deliberation and premeditation; that in order to constitute murder in either degree there must be malice, and unless the death occur in the perpetration of a rape, arson, robbery or burglary, there must exist a design to kill, and that manslaughter, so far as the facts of this case can require you to consider it, is an unintentional killing while the slayer is in the commission of some unlawful act. If you shall find that the plank was placed in its position upon the track, by the defendant for malicious ends, and shall not find that so placing it endangered the lives of those who pass upon the road, though death ensue, he is guilty of manslaughter only. And if you shall find that the position in which he put the plank was such as greatly to endanger life, if you shall further be of

opinion, that the defendant was so destitute of reason, as actually to suppose that life was not endangered, and directed his malice against property only, he is guilty of manslaughter.

The considerations connected with this branch of the case are of too painful suggestion to be dwelt upon unnecessarily. If your convictions require you to approach it, you will bring to its decision all the wisdom, all the firmness, and all the tenderness that belongs to prudent and just men.

The defendant is in your hands. You, alone, are judges of the facts; you, alone, can apply the law. Act, as we doubt not you will, in full view of your obligations to the public, and your duties to the prisoner. They can never come in conflict.

If you shall find for the prisoner, return a general verdict of not guilty. If you find against him, be specific in your verdict as to the grade of the offense.

After having been out about five hours, the jury came into court, with a verdict of guilty of murder in the second degree.

WARRANTY.

187

Proof of in Reduction of Damages.

[Pickaway, Ohio, Supreme Court, November Term, 1851.]

Before Justices Caldwell and Ranney.

[Reported by P. C. SMITH.]

JOSEPH KINNEAR V. MILTON M. THOMAS, ADM. OF WM. THOMAS.

In an action by the payee against the maker of a promissory note for goods purchased, the defendant, by filing notice with the general issue, may give in evidence, a fraud or false warranty by the plaintiff, at the time of the sale, in reduction of the plaintiff's damages.

This is a writ of error to the court of common pleas of Pickaway county.

The action below was assumpsit upon a promissory note. The defendant filed, with a plea of the general issue, a notice, that the note was given for a horse, which the plaintiff falsely and fraudulently warranted to be a certain age; that the horse being in fact of a much greater age, was of less value, so that the defendant was deceived to his prejudice, by the fraudulent warranty. 188

The plaintiff moved to strike the notice from the files; because the matters alleged did not show a total failure of the consideration of the note; nor a total failure, as to any distinct part of the consideration.

The court below sustained the motion. To this ruling, the defendant excepted.

Messrs. H. N. Hedges, Sen., and Jones & Smith, for the plaintiff in error, relied upon the following authorities: 1st, As to fraud: *Becker v. Vrooman*, 13 John. Rep., 302; *Burton v. Stewart*, 2 Wendell, 236; *Harrington v. Stratton*, 22 Pick., 510. 2d. As to false warranty: *Basten v. King*, cited in *Basten v. Butler*, 7 East., 480; *Poulton v. Lattimore*, 17 Eng. Com. Law, 373; *Street v. Blay*, 22 Eng. Com. Law, 122; *DeSe- whanberg v. Buchanan*, 24 Eng. Com. Law, 352; *McAllister v. Reab*, 4 Wendell, 484; S. C., 8 Wendell, 109.

Mr. C. N. Olds, for the defendant in error, cited *Baker v. Thompson*, 16 Ohio R., 504.

RANNEY, J. In an action by the vendor against the vendee for goods sold, the defendant by giving notice with his plea of the general issue, may give in evidence any fraud or false warranty by the vendor, in reduction of the plaintiff's damages, and in so deciding we do not overrule any decision heretofore made by this court. If there has been any fraud on the part of the vendor in the sale, or deceit used by him by which the vendee has been prejudiced, he may recoupe his damages in an action by the vendor, on the note given for the article purchased, as well as in an action for goods sold and delivered.

This is the doctrine of the modern English authorities, and it is also the doctrine in New York, Massachusetts, and several other states; and we think it the correct doctrine. The defendant may do this without the aid of the statute (Swan's Stat., 685), allowing a failure in consideration, in whole or in part, to be given in evidence. It is proper that notice should be given with the general issue, to apprise the plaintiff of the defense to be relied on.

We think the court below erred in striking the notice from the files. Judgment reversed.

303

FORECLOSURE OF MORTGAGE.

[Commercial Court of Cincinnati.]

JOHN WHETSTONE, ADM'R OF ABISAH MEDDOCK, v. JOHN C. THORP,
JOHN MEARS, ET AL.

IN CHANCERY.

On the 11th day of July, 1850, the complainant filed his bill, setting forth that on the 21st of August, 1816, one John Miles mortgaged to Meddock a tract of land, to secure the payment of his moiety of certain joint and several promissory notes, amounting to \$4,900, given by Miles and Meddock to one Leonard Sayre, in a mercantile transaction had between the parties on the 14th of February, 1814.

The bill stated that Meddock paid his moiety and stood bound for the residue, and that the mortgage was subject to the condition, that if Miles should pay to Sayre the full amount of his half of the notes, with interest, so as to save Meddock harmless, then the mortgage should be void. The bill further stated that Miles failed to pay the notes to Sayre, and that Meddock was forced to pay and did pay the notes, and that afterwards, in 1828 and 1831, and at divers other times, Miles acknowledged his indebtedness and liability to Meddock, on account of said payment, but that Meddock did not bring suit, because Miles requested that he would hold on to the premises mortgaged for payment.

The bill further stated that the land had been sold to the defendants, who now hold it by deed from Miles, claiming ownership. Prayer for a sale and for general relief.

The defendants demurred specially :

1. For want of equity.

2. That the notes were paid by Miles so far as he was bound to pay them, and that the mortgage was discharged.

3. That the debt for money paid was barred by the statute of six years.

4. That the remedy on the mortgage to subject the land was barred by the statute of twenty-one years.

5. That the demand was stale.

The case was argued by *A. E. Gwynne*, for complainant, and by *M. H. Tilden* and *F. Ball*, for the defendants.

The defendants' counsel, in support of the demurrer, made the following among other points :

I. That the defendants may demur, when the bill shows on its face the statute bar, or laches on the part of the complainant. Story, Eq. Pl., sec. 484, 505, 751 ; 8 Howard, 210. 304

II. The payment of Miles's moiety of the notes by Meddock, created only a simple contract debt in assumpsit for money paid, which was barred in six years by the act of 1810. 1 Chase, 656, sec. 1 ; 5 Ohio, 445 ; and if an action of *debt* on simple contract was not barred by the act of 1810, it was by the act of 1824. 2 Chase, 1402, sec. 2 ; 12 Ohio, 21.

III. If the debt fails by reason of release, statute bar or otherwise, the mortgage also fails, for the mortgage is a mere security for the debt. Wright, 249 ; 2 Story Eq., sec. 1016 ; 11 John., 534 ; 18 John., 114, 115 ; 5 Wend., 578 ; 2 Gall., 155.

IV. That inasmuch as more than twenty-one years had elapsed from the time the debt became due to the date of filing the bill, and no action of ejectment could be sustained on the mortgage, therefore no bill in equity to subject the mortgaged premises can be sustained. 1 Chase, 656.

V. The demand is stale and equity will not enforce it. 1 Story, Eq., sec. 529 ; Amb., 645 ; 2 John. Cases, 432 ; 5 John. Ch., 545 ; 6 John. Ch., 369 ; 6 Peters, 51 ; 9 Peters, 405 ; 15 Ohio, 572 ; 17 Ohio, 354 ; 19 Ves., 327 ; 12 John., 242 ; 10 John., 381 ; 12 Mass., 389.

The counsel for the complainant made the following points :

I. The defense relied on cannot be asserted on demurrer. 3 Atk., 225 ; 2 John. Ca. ; 13 Ohio, 451 ; 3 Barb., 481 ; 4 Wash. C. C., 639 ; 3 Bro. C. C., 646 ; 2 Ves. Jr., 83 ; 4 Bro. C. C., 254 ; 4 John. C. C., 216 ; 5 John. C., 545.

II. Debt on simple contract was not barred by the act of 1810, and the act of limitation in force at the time the cause of action accrued, is to govern. 3 Ohio, 387 ; 7 Ohio, p. ii., 153 ; 6 Ohio, 96 ; 7 Ohio, p. ii., 153 ; 12 Ohio, 21 ; 10 Ohio, 104.

III. The mortgage is not barred, although the debt may be barred. 1 Conn., 160 ; 18 Conn., 268 ; 2 S. & M., 687 ; 5 S. & M., 651 ; 7 Paige, 465 ; 1 Freem. Ch., 474 ; 19 Pick., 19 ; 16 Ohio, 66 ; 2 Ed. Ch., 304, 478.

IV. If presumption of payment after the lapse of twenty years is relied on as a bar, it must be asserted by answer and not by demurrer. 5 Leigh, 350 ; 3 John. Ch., 129 ; 4 Wheat., 497 ; 5 John. Ch., 545 ; 9 Wheat., 497 ; 7 Paige, 465.

KEY, Judge, held, in substance, that where, upon the case stated in the bill, it appears that the complainant is not entitled to relief by reason of lapse of time and the statute of limitations, the defendant may demur. 308

That where the statute of limitations would bar both an action for the recovery of debt secured by the mortgage, and also an action of ejectment brought on the mortgage for the recovery of the possession of the mortgaged premises, a court of equity will, as a general rule, refuse to entertain a bill to foreclose the mortgage.

That assuming this debt to have accrued while the statute of limitations of 1810 was in force, and that it was not barred by the terms of that statute, and not subject to the statute of 1824, nor to any of the subsequent statutes, yet the lapse of time since the debt accrued up to the time of filing the bill in 1850, is a good defense to a bill filed to foreclose the mortgage against the grantees of the mortgagor.

That a parol acknowledgment of the debt by the mortgagor, made to the mortgagee, in 1831, coupled with a statement of his inability to pay, and a request that the mortgagee retain the mortgage as security, will not affect the case as against the grantees of the mortgagor, when nineteen years are permitted to elapse before bringing suit. Equity acts in obedience to, and in analogy with, the statute of limitations, and such an acknowledgment and request as that stated in the bill would have no effect in an action of ejectment, and a court of equity will refuse to give effect to it on a bill to foreclose.

Demurrer sustained and bill dismissed.

407

MURDER BY POISON.

[In the district of Ohio, Fifth Circuit, Hamilton County, April Term, 1852.]

Before all the Judges—Mr. Justice Thurman Presiding.

THE STATE OF OHIO V. JAMES SUMMONS.

[Reported by Mr. JUSTICE THURMAN.]

MURDER IN THE FIRST DEGREE—POISONING—MALICE—TESTIMONY OF DECEASED WITNESS IN CRIMINAL CASES—WEIGHT OF CIRCUMSTANTIAL EVIDENCE—CONFESSIONS—REASONABLE DOUBT DEFINED—INSANITY—MENTAL IMBECILITY.

[Where one with a knowledge that a drug is a deadly poison, purposely puts it into water or tea, knowing or believing that it would be, or was likely to be, drunk by some person other than himself, the law presumes that he did so of deliberate and premeditated malice.

Malice in law is a wilfully formed design to do another an unlawful injury, whether such design be prompted by deliberate hatred, or revenge, or by the hope of gain, or springs from the wantonness and depravity of a heart regardless of social duty and fatally bent on mischief.

The constitutional right of the accused to meet the witnesses against him face to face, is not infringed by the admission of the testimony of witnesses, who swear to the substance of what was testified to on a former trial, by a witness who has since deceased. Such evidence will be excluded, unless the witness can swear to the substance of the whole testimony, as well as that upon the examination in chief; and considering that the jury are not able by a personal inspection of the witness' manner to judge for themselves of the amount of credit due to his testimony, and from the liability of those who heard him to err in their narration of his evidence, such testimony is to be received with caution. The ruling of Mr. Justice SPALDING in *Ohio v. Summons*, 8 Western Law Journal, 473, approved.

In order to warrant a conviction upon circumstantial evidence alone, it must be so strong and convincing as to leave no reasonable hypothesis that some other person than the accused was the perpetrator of the crime.

Where a perfectly sane man, under circumstances not calculated to disturb his reason or memory, or to induce him to make a false accusation of himself, coolly, deliberately, and seriously, makes a confession of guilt, and a reasonable, natural cause for his doing so is apparent, the confession is certainly entitled to much consideration. But on the other hand, where the man is not perfectly sane, or is weak minded, or the circumstances in which he is placed are of a nature to deprive him of the full and free exercise of his memory or judgment, or motives exist for making an untrue confession, or he does not speak coolly, deliberately and seriously, or no natural motive for confessing his guilt appears, and especially where all these facts concur, the confession is to be received with extreme caution and unless corroborated by other reliable testimony, but little, if any, weight can be given to it.

A reasonable doubt, which entitles the prisoner to an acquittal, is an honest uncertainty existing in the minds of a candid, impartial, diligent jury, after a full and careful consideration of all the testimony with a single eye to the ascertainment of the truth, irrespective of the consequences of their finding. It is not a mere speculative doubt voluntarily excited in the mind, in order to furnish a pretext for avoiding the rendition of a disagreeable verdict. Such a doubt is considered by the law as merely captious.

The ruling of Mr. Chief Justice Shaw, in Rogers' case, 7 Metcalf's R., 500, as to that degree of insanity which will excuse the commission of an act, otherwise criminal, approved and followed. Mental imbecility, as well as insanity, will excuse the commission of such acts.]—Eds. OF W. L. J.

The only facts necessary to an understanding of the charge of the court, are that the prisoner was indicted for the murder of Electa Rives by putting poison into the tea-kettle at his father's house, to which she was an invited guest, and of which tea the deceased, with the family, partook. Mary Clinch, the cook, who swore to the prisoner's putting the poison into the kettle, testified on a former trial; and she having since died, Mr. Logan, who had been employed by Judge Walker, of counsel for the state on that trial, to take notes of the testimony for the purpose of that trial, was allowed to state the substance of her testimony and used the notes to refresh his memory and read them to the jury. Other witnesses were called for the same purpose.

The prisoner being charged with purchasing the poison, uniformly denied it; but when asked privately by a friend, why he bought it, replied, "If I did buy arsenic, it was to poison rats."

Upon the close of the argument of counsel, Mr. Justice THUR- 409
MAN charged the jury as follows:

Gentlemen of the Jury:

The statute, under which the defendant is on trial, is in these words:

"That if any person shall purposely, and of deliberate and premeditated malice, or in the perpetration, or attempt to perpetrate any rape, arson, robbery or burglary, or by administering poison or causing the same to be done, kill another; every such person shall be deemed guilty of murder in the first degree, and, upon conviction thereof, shall suffer death." Swan's St., 229, § 1.

The indictment charges that the defendant, on July 20, 1849, at Hamilton county, Ohio, purposely and of deliberate and premeditated malice, a large quantity of deadly poison called white arsenic, to wit, one ounce thereof, did put, mix and mingle into and with a certain quantity of water, which one Electa Rives, then and there intended and was about to drink, he well knowing that she intended and was about to drink said water, and he also well knowing said white arsenic to be a

deadly poison—that she afterwards, on the same day, at said county, did drink and swallow down a great quantity, to wit, half a pint of said water with which said arsenic was so mixed, she not knowing that there was white arsenic, or any other poisonous or hurtful ingredient mixed and mingled with said water—by means whereof she became sick and languished until the next day, on which, to wit, on July 21, 1849, at said county, of the poison aforesaid and the sickness and distemper occasioned thereby, she died.

To this indictment the defendant has pleaded not guilty; and the issue, thus made between the state and him, you have been empanelled and sworn to try. You have heard the testimony, and the able arguments of counsel, and after you shall have received the charge of the court, the case will be fully submitted to you for your decision. Upon the *facts* of the case we have nothing whatever to say. It is your exclusive province to decide upon them. Ours is to instruct you in regard to the *law*. You will therefore understand that in nothing we may say to you, do we mean to intimate, in the slightest degree, our opinion of the guilt or innocence of the accused. Nor shall we recapitulate the evidence. We observed that you listened to it patiently and faithfully, and we have no doubt that you recollect it.

When you retire, you will find it convenient to consider the questions arising in the case, in the following order:

410 1. Is Electa Rives dead; and if so, did she die before the finding of this indictment? The indictment alleges that she died on July 21, 1849; but proof of her death on any day before that on which the indictment was found, viz., July 25, 1849, is sufficient. If you are satisfied of her death before that day, you will next proceed to inquire—

2. Was her death caused by poison, to wit: White arsenic, swallowed by her, at Hamilton county aforesaid, and if so, was she ignorant when she swallowed it, that she was taking poison?

The state alleges that a quantity, to wit, one ounce of white arsenic was put into some water in the kitchen of Capt. Summons in this city: that tea was afterwards made with this poisoned water; that Electa Rives, in ignorance of its character, partook of it, was thereby poisoned, and of such poisoning died. You have heard the testimony of the chemists, medical men and others, relied upon to establish these allegations, and also the testimony in relation to the cholera and other matters, which, the defendant's counsel insist or suggest, refute them. You will weigh all this evidence, and if it fail to satisfy you, beyond a reasonable doubt, that Electa Rives came to her death by the alleged poisoning, the prisoner must be acquitted. But if you be convinced, beyond a reasonable doubt, that she was poisoned as alleged, that she drank the tea in ignorance that it contained poison, and that her death was caused by the poison, you will proceed to inquire—

3. Is the defendant the person who put the arsenic into the water? and if so, did he do it purposely and of deliberate and premeditated malice; knowing that the water, whether made into tea or otherwise, would be, or was likely to be, drunk; and knowing the arsenic so put into it to be a deadly poison?

The indictment alleges that he put a large quantity, to wit, one ounce into the water, but it is immaterial what the quantity was, if the death of Electa Rives was caused thereby. So it is averred that he knew that Electa Rives intended and was then and there about to drink the

water; but it is not indispensable to his conviction that he should have had this knowledge. For if his intent was to poison some one else, and she, in ignorance, took the poison and, in consequence of doing so, died, he is equally guilty under this indictment, as if his specific design had been to destroy her. It is also alleged that she drank a great quantity, to wit, half a pint, of the poisoned fluid, but as to the quantity, it need not be proved as laid. It is immaterial what quantity she drank, if what she did drink produced her death.

If the evidence satisfy you, beyond a reasonable doubt, that the accused, with a knowledge that the arsenic was a deadly poison, purposely put into the water, or tea, knowing or believing that it would be, or was likely to be, drunk by some person other than himself, the law presumes that he did so of deliberate and premeditated malice. Thus, we find it laid down in the authorities, both ancient and modern, that "where a man wilfully poisons another, in such a deliberate act the law presumes malice, though no particular enmity can be proved." 4 Com., 34; Arch. C. Pl., 321; 3 Inst., 48; Wright's R., 28; Wharton's C. L., 226; 1 Hale, 455, 466; Wharton's C. L., 229; *Com. v. Norton*, 3 Law Rep., 241; *Com. v. Kinney*, *ibid*, 405. 411

And this leads us, gentlemen, to observe to you, that the term, *malice*, in its legal acceptation, has a more extensive meaning than in its ordinary colloquial sense. In common parlance, we are apt to associate the ideas of malice with the passions of anger, hatred, or revenge; but malice, in contemplation of law, may exist without the presence of either of these passions. Indeed, the fact of suddenly excited anger oftentimes rebuts the presumption of malice, as in the case of an unpremeditated fight, or affray; and some of the acts esteemed in law among the most deliberately malicious, are committed without either anger, revenge or hatred. Thus the highwayman who slays the traveler of whom he knows nothing, not out of anger, hatred, or ill-will, but merely to obtain money, is guilty of a deed considered by the law as in the highest degree malicious. So if a man wilfully lay poison for A., and B. take it and die thereof, such killing is malicious murder, although the poisoner had no ill-will towards the deceased. For malice in law is a wilfully formed design to do another an unlawful injury, whether such design be prompted by deliberate hatred, or revenge, or by the hope of gain, or springs from the wantonness and depravity of a heart regardless of social duty, and fatally bent on mischief.

"Malice," said our late supreme court, "is the dictate of a wicked, depraved and malignant heart. It is not necessary that the malignity should be confined to a particular ill-will towards the person injured. It is evidenced by any act which springs from a wicked and corrupt motive, attended by circumstances indicating a heart regardless of social duty, and bent on mischief. Malice is said to be express where the cruel act is done with a sedate and deliberate mind—with settled and formed purpose. This kind of malice is generally evidenced by the circumstances preceding and attending the transaction complained of, as by threats, menaces, former grudges, lying in wait, concerted schemes to do injury, or by an unusual degree of cruelty attending the act. Malice is implied where the killing is sudden, without any or great provocation; and, also, where the act done necessarily shows a depraved heart, as the giving of poison." Wright's R., 27, 28. 412

If the evidence do not convince you, beyond a reasonable doubt, that the defendant is guilty of the alleged poisoning, as charged against

him, you must return a verdict of acquittal; but if you be so convinced, and if the other allegations to which we have called your attention are in like manner established, then you will find him guilty, unless the defense of insanity, or rather imbecility, made in his behalf, is sustained by the testimony.

Before we proceed, however, to this branch of the case, it is proper that we should make some remarks to you in regard to the testimony of Mary Clinch, which has been detailed to you not by herself, for she is dead, but, at second hand, by witnesses, who heard her testify. This secondary evidence the law permits and requires you to consider; but what weight shall be given to it, is a question for your determination. In deliberating on this question it is necessary for you to remember, that it is not alone what a witness says that demands the attention of a jury. His appearance and manner of testifying are important matters for consideration, and these oftentimes have as much and as rightful an influence, in deciding upon his credibility as has the apparent reasonableness, or unreasonableness of his statements. In this case, you are deprived of these aids in judging of the testimony of Mary Clinch. As to her appearance and manner of testifying, you know nothing personally. What you know, you learn from narration. So, too, the imperfection of memory is to be borne in mind, and the consequent difficulty of detailing former statements with accuracy, after a considerable lapse of time. The narrator may be ever so honest and careful, and yet the liability to error is almost unavoidable. For these and other reasons that might be mentioned, it is not, perhaps, too much to say that but few cases occur where secondary evidence of this kind is entitled to full weight. Much must depend upon the fact whether it is corroborated or not by other and reliable testimony. When not thus corroborated, it is to be regarded with extreme caution. When a jury are satisfied that they have not the substance of all that was said by
413 the deceased witness, it is to be rejected altogether. When they are satisfied that they have all the substance and it is strongly fortified by other satisfactory proofs, it may be entitled to considerable weight.

We are asked to charge you that if you believe, "that Logan has failed to give all the substance of all the testimony of Mary Clinch, or has failed to give her testimony in the order and connection in which it was delivered by her on the stand, his testimony does not come within the rule under which it was admitted by the court; and, at all events, that, in consideration of the great lapse of time, and the voluminous nature of the testimony he undertakes to repeat, it ought to be received with the greatest caution."

We have already said, in effect, that Mr. Logan's testimony is to be received with the greatest caution; and we have no hesitation in ruling that a witness, called to narrate the evidence of a deceased witness, should recollect the order and connection of the testimony, so far as such order and connection are necessary to convey an accurate understanding of what the deceased said and meant, and the influence and credit to be given to the testimony. But we are not prepared to say that if Mr. Logan has failed to give the substance of all Mary Clinch's evidence, that, therefore, you must entirely reject his testimony; provided, that, taking his testimony and that of the other witnesses who have detailed what she testified to, you are satisfied that you have the substance, correctly, of all her testimony. The very point under consideration was decided in the case

of *Ballenger v. Barnes*, 3 Dev., 460, Cowen & Hill's note, 442, to Phil. on Ev., and the ruling in that case is supported by other high authorities. The result of these authorities is what we have already stated, namely, that if the jury are satisfied from the testimony of all the witnesses, that they, the jury, have before them the substance of all the evidence of the deceased witness, the testimony must be considered. What weight shall be given to it is for the sound judgment of the jury to decide.

It is also proper that we should speak to you on the subject of circumstantial evidence, for the question whether the defendant poisoned the water, or tea, depends upon that kind of testimony. No one saw him put in the poison—circumstances are relied on to establish that he did so. On this point it is only necessary for us to say that any fact material to be proved in a court of justice may be established by circumstantial testimony. In criminal cases especially, such proof must, of necessity, be often resorted to; for men do not usually commit great or infamous crimes openly. Where direct, positive proof, indispensable to conviction, a majority of offenders, perhaps, would go unpunished, and there would be no safety for life or property. But while circumstantial evidence is clearly admissible, is frequently satisfactory, and in particular instances has been thought even more convincing than would have been the positive statement of a witness, it is nevertheless true, that it requires of a jury great care and judgment in considering it; and that, in order to warrant a conviction upon such testimony alone, it must be so strong and convincing as to leave no reasonable hypothesis that some other person than the accused was the perpetrator of the crime. 414

We are asked to instruct you as to the degree of credit to be given to confessions. Upon this subject judges have apparently entertained very different opinions. Some have seemed to consider them as forming the highest and most satisfactory evidence of guilt. Others have thought them deserving scarcely any weight at all. Perhaps this diversity is more seeming than real. Where a perfectly sane man, under circumstances not calculated to disturb his reason or memory, or to induce him to make a false accusation of himself, coolly, deliberately and seriously, makes a confession of guilt, and a reasonable, natural cause for his doing so is apparent, the confession is certainly entitled to much consideration. But, on the other hand, where the man is not perfectly sane, or is weak minded, or the circumstances in which he is placed are of a nature to deprive him of the full and free exercise of his memory or judgment, or motives exist for making an untrue confession, or he does not speak coolly, deliberately and seriously, or no natural motive for confessing his guilt appears; and especially where all these facts concur, the confession is to be received with extreme caution, and, unless corroborated by other reliable testimony, but little, if any, weight can be given to it. In reference to this sort of confession a judge of great eminence has truly said:

"That hasty confessions made to persons having no authority to examine, are the weakest and most suspicious of all evidence. Proof of them may too easily be procured, words are often misrepresented through ignorance, inattention, or malice, and they are extremely liable to misconstruction. Moreover, this evidence is not, in the usual course of things to be disproved by that sort of negative evidence, by which the proof of plain facts may be and often is confronted." Foster's Discourses, 243; Roscoe's Crim. Ev., 35.

Apply what we have said to the admissions alleged to have been made by the defendant. If you find that he did make them, inquire what

was the state of his mind at the time, in what circumstances was he placed, what motive had he for making them, were they cool, 416 clear, and deliberate, or hasty, uncertain, and confused, are they corroborated by other and reliable testimony or are they unsupported. Consider all these matters, and any others in evidence that reflect on the question, and determine whether these admissions are entitled to any, and if any to what, weight. It is proper, however, that we should add that a confession made by a person when actually laboring under a fit of delirium tremens, is not testimony at all. If you find that at the time the defendant made either of the alleged admissions he was in such a fit, you should at once lay that particular admission wholly out of the case.

We have frequently used the expression "convinced beyond a reasonable doubt." It is necessary that you should understand what we mean by the expression "a reasonable doubt." A reasonable doubt is an honest uncertainty existing in the minds of a candid, impartial, diligent jury, after a full and careful consideration of all the testimony, with a single eye to the ascertainment of the truth, irrespective of the consequences of their finding. It is not a mere speculative doubt voluntarily excited in the mind, in order to furnish a pretext for avoiding the rendition of a disagreeable verdict. Such a doubt is considered by the law as merely captious. With the consequences of your verdict you have nothing to do, farther than this, that they should induce you to examine the testimony with the utmost care and to exert, in the very best manner of which you are capable, the faculties of your minds to ascertain the truth. For you have but a single duty to perform, and that is to find the truth. You will, therefore, gentlemen, when you retire, give this case your most earnest and faithful consideration with but one object in view, namely, to ascertain whether the defendant is guilty or innocent; and if, after candidly weighing all the testimony, and giving to it such influence as in law and reason it deserves, there exists in your minds an honest doubt of the sufficiency of the proof as to any matter indispensable to be established by the state to warrant a conviction, you will give the accused the benefit of such doubt by rendering a verdict of acquittal. For the law, in its humanity, deems it better that many guilty men should go unpunished for want of adequate proof of guilt, than that an innocent man should be convicted upon insufficient testimony. If, however, you have no such reasonable doubt, you will proceed to consider the defense of insanity.

416 Upon this point we design to be comparatively brief, for there is possibly greater danger of perplexing and misleading a jury by a multitude of definitions and illustrations of insanity than reason to expect that precise ideas will be afforded by them. Medical and other men differ widely as to what kind, or degree, of insanity ought to constitute a defense in a criminal case, but it is not the policy of the law that we have to deal with. With you and with us the question is, not what the law ought to be, but what is the law. And what it is, has been laid down by the highest authorities. In accordance with these authorities, we instruct you:

"That in order to constitute a crime, a man must have intelligence and capacity enough to have a criminal intent and purpose; and if his reason and mental powers are either so deficient that he has no will, no conscience or controlling mental power, or if, through the overwhelming violence of mental disease, his intellectual power is for the time obliterated,

ated, he is not a responsible moral agent, and is not punished for criminal acts." *Per* SHAW, C. J., in Abner Rogers's case; 2 Greenleaf's Ev., 354, note.

"But, a man is not to be excused from responsibility, if he has capacity and reason sufficient to enable him to distinguish between right and wrong, as to the particular act he is then doing; a knowledge and consciousness that the act he is doing is wrong and criminal, and may subject him to punishment. In order to be responsible, he must have sufficient power of memory to recollect the relation in which he stands to others, and in which others stand to him; that the act he is doing is contrary to the plain dictates of justice and right, injurious to others, and a violation of the dictates of duty. On the contrary, although he may be laboring under partial insanity, if he still understands the nature and character of his act and its consequences, if he has a knowledge that it is wrong and criminal, and a mental power sufficient to apply that knowledge to his own case, and to know that if he does the act he will do wrong and be liable to punishment, such partial insanity is not sufficient to exempt him from responsibility for criminal acts." Rogers's case, *ante*: 2 Greenleaf's Ev., 351, 372.

In the case of William Clark, 12 O. R., 494, our late supreme court properly charged the jury as follows:

"Was the accused a free agent in forming the purpose to kill? Was he, at the time the act was committed, capable of judging whether that act was right or wrong? And did he know at the time that it was an offense against the laws of God and man? If you say nay, he is innocent. If yea, and you find the killing to have been purposely, with deliberate and premeditated malice, he is guilty.

"In trying this question, you will bear in mind that the law presumes 417 every person, of the age of fourteen years (or upwards) to be of sufficient capacity to form the criminal purpose; to deliberate and premeditate upon the acts which malice, anger, hatred, revenge, or other evil disposition might impel him to perpetrate. To defeat this legal presumption, which meets the defence of insanity at the threshold, the mental alienation relied upon by the accused must be affirmatively established, by positive or circumstantial proof. You must be satisfied, from the evidence, that the perverted condition of the faculties of the mind, indicated in the main question, which I have already stated as excusing from crime, did exist at the time Sells was killed. It is not sufficient if the proof barely shows that such a state of mind was possible; nor is it sufficient if it merely shows it to have been probable. The proof must be such as to overrule the legal presumption of sanity; it must satisfy you that he was not sane. It would be unsafe to let loose upon society great offenders upon mere theory, hypothesis or conjecture. A rule that would produce such a result would endanger community, by creating a means of escape from criminal justice, which the artful and experienced would not fail to embrace. The defence of insanity is not uncommon. It is by no means a new thing in a court of justice; it is a defense often attempted to be made, more especially in cases where aggravated crimes have been committed, under circumstances which afford full proof of the overt acts, and render hopeless all other means of evading punishment. While, then, the plea of insanity is to be regarded as a not less full and complete, than it is a humane defense, when satisfactorily established, and while you should guard against inflicting the penalty of crime upon the unfortunate maniac, you should be equally careful that you do not suffer an ingenious counterfeit of the malady to furnish protection to guilt."

And here, gentlemen, it is necessary that you should understand that the law presumes a man to know. The law assumes that every man, who is not clearly proved to be insane is acquainted with the laws of the land, and although this may not be strictly true in fact, yet the security of society requires the assumption. For it would never do to allow a sane man to exonerate himself from the consequences of crime by a plea that he was ignorant of the law. The rule on this subject

was very clearly stated by Chief Justice of Massachusetts, in a case in which the defense was insanity. Shaw, C. J., Rogers' case. 2 Greenleaf's Ev., 352, note.

"The law," said the learned judge, "assumes that every man has knowledge of the laws prohibiting crimes; an assumption not strictly true in fact, but necessary to the security of society, and sufficiently near the truth for practical purposes. It is expressed by the well known maxim, *ignorantia legis neminem excusat*—ignorance of the law cannot be pleaded as an excuse for crime. The law assumes the existence of the power of conscience in all persons of ordinary intelligence; a capacity to distinguish between right and wrong in reference to particular actions; a sense of duty and of right. It may also safely be assumed, 418 that every man of ordinary intelligence knows that the laws of society are so framed and administered, as to prohibit and punish wrong acts, violations of duty towards others, by penalties in some measure adapted to the nature and aggravation of the wrong and injurious acts thus done. If, therefore, it happens to be true in any particular case, that a person tempted to commit a crime, does not know that the particular act is contrary to positive law, or what precise punishment the municipal law annexes to such act; yet if the act is palpably wrong in itself, if it be manifestly injurious to the rights of another, as by destroying his life, maiming his person, taking away his property, breaking into or burning his dwelling house, and the like, there is no injustice in assuming that every man knows that such acts are wrong, and must subject him to punishment by law; and, therefore, it may be assumed, for all practical purposes, and without injustice, that he knows the act is contrary to law."

These, gentlemen, are presumptions which the accused must rebut by clear and satisfactory testimony, in all cases in which insanity is relied on as a defense, unless, indeed, they are already overcome by the testimony of the state.

A few words may be necessary on the particular subject of weakness, or imbecility of mind. This stands upon the same principles already stated to you. If a man's intellect is so feeble as to be incapable of distinguishing right from wrong, he is not accountable for what he does. But, though weak minded, he is nevertheless responsible if he have sufficient mind to know that the act he commits is wrong, is criminal, such an act as ought to and may subject him to punishment.

You have heard much testimony as to the habits, mental and physical, illness, family troubles and misfortunes of the accused, at various periods. This evidence is adduced to prove that he was of unsound mind at the time he committed the act in question, if he did commit it. For that is the material question. No matter how insane or inebriate, he may have been at other times, if, when he committed the deed, he was of sound mind, he is responsible. Proof of insanity, or imbecility, at other times is, however, very important to be considered, as furnishing a presumption, more or less forcible according to the strength of the testimony, that the accused was of non-sane mind when the act in question was perpetrated. And it is also necessary that you should understand, that when there is clear proof of prior insanity the law presumes that it continued down to, and at the time the act was committed, and this presumption the state must rebut by proof in order 419 to obtain a conviction. When we speak, however, of prior insanity, we do not mean a mere temporary fit. A man of sound mind may

in a spell of sickness, or fit of intoxication, be temporarily insane, but such temporary madness affords no presumption of continuing insanity.

Gentlemen, much has been said by counsel as to the action and opinions of former juries in this case, but it is our duty to tell you that you have nothing whatever to do with those acts or opinions. You must lay all such matters wholly aside. They are not in the case, and your minds are not to be influenced in the least degree by them. You are the triers of this issue, and you are to decide it by the light of your judgments and not by the opinions of juries who have preceded you, or of the judges who let the accused to bail, a circumstance that was also alluded to. You are to decide it upon the evidence and not upon matters out of the case.

A few words, gentlemen, as to what you must say in your verdict and we are done.

If you find the defendant not guilty, you will merely say so. But if you find him guilty, the statutes require you to specify in your verdict of what crime he is guilty. Swan's St., 238, § 39. If, therefore you come to the conclusion that he is guilty as alleged in the indictment you will say: We, the jury, find the defendant, James Summons, guilty of murder in the first degree as charged in the indictment, or words to this effect. It will not do to say simply that you find him guilty of murder; for the crime of murder is of different degrees. If you find him guilty as charged in the indictment you will specify in your verdict that he is guilty of murder in the first degree.

Gentlemen, you have solemnly sworn, to well and truly try the issue between the state and the defendant and a true verdict to give according to the law and the evidence. That you will do so to the best of your skill and understanding, we entertain no doubt. Take the case, give it a fair, candid, and faithful consideration, and return such a verdict as the law and the evidence require at your hands.

Verdict, guilty.

Mr. Pugh, Attorney General, and *Mr. Pruden*, Prosecuting Attorney, for the State.

Messrs. N. C. Read, F. T. Chambers, and R. B. Hayes, for the Prisoner.

[A motion for a new trial was afterwards made on the ground of the improper admission of the evidence as to the testimony of Mary Clinch, as conflicting with the constitutional right of the accused "to meet the witnesses face to face;" which motion was overruled, and on the 1st of May, the prisoner was sentenced to be executed on the 3d of February, 1853. There being no statute in Ohio to limit the discretion of the court as to the time of execution, this day was named with a view to allow ample time for the hearing of the cause upon writ of error, on the points of law raised, should one be brought.]—EDS. W. L. J.

CORRECTION OF THE FOREGOING CASE ON PAGE 577.

No part of the report of this case was prepared by Mr. Justice THURMAN, except the charge to the jury. The syllabus, as is stated on page 408, was prepared by one of the editors of this Journal, who was present at the trial. A passage has been pointed out to us, in the statement of the facts, which is liable to mislead. Mr. Logan's notes were not offered in evidence, nor was he permitted to read them to the jury. The question whether they could be given in evidence was not raised, the counsel for the state expressly declining to raise it, and the counsel for the defendant also declining to offer the notes. Mr. Logan was permitted to refresh his recollection by referring to them, but he was repeatedly told that, as the notes themselves were not offered in evidence, he must not testify to what was contained in them further than his recollection went; that he could use them only to refresh his memory. Mr. Justice THURMAN expressed no opinion as to the admissibility of the notes themselves, as independent evidence, in the case.—[EDS. OF W. L. J.]

COUNTERFEITING.

[In the District Court of Ohio, First Circuit, Butler County, May Term, 1852.]

Before Judges Corwin, Hart and Haines.

IN ERROR.

SAMUEL SNOW V. THE STATE OF OHIO.

[Reported by JAMES CLARK.*]

1. On the trial of a party for uttering and publishing a counterfeit bank note on the 19th day of December, 1850, it is incompetent for the state, for the purpose of proving the *scienter*, to offer evidence that sometime in the month of October preceding, the defendant proposed to a railroad contractor, "*to pay off his hands for sixty cents on the dollar.*"
2. It is error for the court to instruct the jury, that they may find the defendant guilty *generally* on a count of the indictment which charges the criminal uttering of *two* counterfeit bank notes therein described, if they are satisfied that he criminally passes *either* of said notes, though they may not be able to identify the particular note so passed.

The facts in this case, as disclosed by the bill of exceptions, are these: On the evening of the 19th of December, 1850, the plaintiff in error, in company with a young man, came to the town of Bethany, Butler county, Ohio, and put up at a tavern there. On the same evening, the young man who accompanied the plaintiff, went by himself to the store of Peter Williamson, a merchant in that town, and purchased from the son of Williamson a bottle of hair oil, for which he paid a one dollar bill, and received the balance in change. The young man then left the store, and some considerable time afterwards on the same evening, the plaintiff went alone to the store, and purchased from Williamson, the proprietor of the store, a pair of socks, for which he likewise paid a one dollar bill, and received the balance in change. Some hours afterwards *both* these bills were discovered to be counterfeit; but none of the witnesses were able to *identify* the one passed by the plaintiff. For the purpose of proving the *scienter*, evidence was admitted on the trial, the plaintiff in error excepting thereto, to the effect, that sometime in the month of October, 1850, at Dayton, Ohio, the plaintiff, while there in the employ of Alexander Cranston, a railroad contractor, proposed to Cranston "*to pay off his hands for sixty cents on the dollar.*" There was also evidence tending to show, that on the evening of the 19th of December, the plaintiff had concealed a purse containing a number of counterfeit bank bills.

The indictment contained *three* counts, the *first* charging the passing of one of the bills above mentioned; the *second* charging the passing of the *other*; and the *third* charging the passing of *both*. At the May term, 1851, of the Butler county common pleas, the plaintiff was tried and found *not guilty* on the *first* and *second* counts, and *guilty* on the *third* count of the indictment. On this verdict judgment was rendered, and the plaintiff was sentenced to four years' imprisonment in the penitentiary.

The errors assigned on the record may all be substantially reduced to the following:

*Submitted to the opposing counsel, who assents to the correctness of the report.—Eds. W. L. J.

1. The admission in evidence of the alleged proposition of the plaintiff in error to Cranston.

2. The charge of the court below to the jury, that they might find the plaintiff guilty generally under the third count of the indictment, if they were convinced that he criminally passed *either one* of the counterfeit bills therein described, though they might not be able to identify the particular bill so passed.

3. The defective character of the third count.

4. Repugnancy in the verdict in finding the plaintiff not guilty of passing *each* of two counterfeit bank notes, and at the same time *guilty* of passing *both*.

James Clark, for the Plaintiff in Error, cited *Barton v. The State*, 18 O. R., 221; *Reed v. The State*, 15 O. R., 223; *Hess v. The State*, 5 O. R., 5; Wharton's Am. Crim. Law, 342; Arch. Crim. Plead., 336; *Reg. v. Cooke*, 8 C. & P., 582; *State v. Bunten*, 2 Nott & McCord, 441; 1 Chitty's Crim. Law, 637, 638; 1 Chitty on Plead., 308; *Henson v. Saffin*, 7 O. R., 232. 422

Isaac Robertson, P. A., for the Prosecution.

CORWIN, J.

1. It appears from the bill of exceptions, that for the purpose of proving that the plaintiff in error passed one of the counterfeit bank notes described in the indictment, *knowing* the same to be counterfeit, the court below permitted evidence to go to the jury, that in the month of October, 1850, the plaintiff in error proposed to a railroad contractor named Cranston, "to pay off his hands for sixty cents on the dollar." We cannot see the applicability of this evidence to the issue submitted to be tried between the parties. It does not appear that the plaintiff in error proposed to pay off Cranston's hands in *counterfeit bank paper*. His proposal, for aught that appears in the case, may have been perfectly fair and honest. We think, therefore, that in admitting the evidence, for the purpose mentioned, injustice was done the plaintiff in error, and that the court of common pleas erred.

The court below charged the jury, that they might find the plaintiff in error guilty generally under the third count of the indictment, if they were convinced that he criminally passed *either one* of the two counterfeit bank notes therein described, though they might not be able to identify the particular note passed. In this also we think the court of common pleas erred. Of the two bills described in the third count, one may have been a base counterfeit, while the other may have been so well executed, as to have been calculated to deceive the best judges; and it is perfectly consistent with the facts proven, that the well executed one may have been the one passed by the plaintiff in error, who may have been deceived by its apparent genuineness, and thus have been entirely innocent in the transaction. We have never known a case in which a party was tried for the criminal passing of counterfeit bank notes, in which it was not required that the notes should be identified.

Judgment reversed, and cause remanded to the court of common pleas for a new trial.

CIRCUMSTANTIAL EVIDENCE.

513 [Court of Common Pleas of Hamilton County, Ohio, February 27, 1852.]

STATE OF OHIO V. NANCY FERRER.

[Reported by MR. JUSTICE CARTER.]

Murder in the first degree—Poisoning—Circumstantial evidence—Insanity.

INDICTMENT FOR POISONING JAMES WESLEY FORREST.

CHARGE TO THE JURY.

Judge CARTER charged the jury as follows:

Gentlemen of the Jury: You are called upon to perform a most solemn and serious duty, and from the close and patient attention we
514 know that you have given, in the long and tedious investigation of this important case, we feel every confidence that you will discharge your duty well.

The prisoner at the bar stands charged with the highest and most atrocious crime known to the law—that of murder by poisoning. Nancy Ferrer is indicted under the first section of the crimes act, which defines killing by administering poison, or causing it to be administered, as murder in the first degree, for which the penalty is death. The indictment contains three counts, which though varying in the allegations as to the substance with which the poison (arsenic) was mingled, are yet in point of law the same; and it is now your duty to determine, from the testimony which has been delivered before you—from the arguments of counsel, and from a proper application of the law, as we shall give it to you, to the facts of the case, whether the defendant, Nancy Ferrer, is guilty of the murder of James Wesley Forrest by poison—whether in the language of the indictment, and of the statute (here referred to and read by the judge) she willfully, purposely and of deliberate and pre-meditated malice committed the act.

The state claims that Nancy Ferrer did commit this crime as charged by the grand jury, and is therefore guilty. And the defense claims that the facts elicited are of too uncertain a nature—that the evidence is but circumstantial, and points with equal or more force, to some one else as the perpetrator of the act; and if the fact should produce the conclusion in the minds of the jury that the act was done by Nancy Ferrer, then they, the defense, say she is not guilty as charged, because she was, and is not, a responsible being—that she did the act in *imbecility*—from *insanity*.

In your investigation of the case, it is your duty to look to all and every part of the testimony that has been adduced. You should give it your most serious and patient attention, and not permit your minds to be swerved by any extraneous influence whatever. Let not your attention be diverted a single moment from the facts as they have been detailed to you, and looking patiently to all the facts in detail, and together view them separately and as a whole. Take them one by one, and see to what conclusion they induce your minds, and then put them all together, like the links of a chain, in determining the conclusion.

You have been told that the case is one of circumstantial evidence. In its chief features, especially as to the person who did the deed, it is. But circumstantial testimony is not to be lightly, captiously or foolishly discredited. It forms the great bulk of all evidence introduced in criminal trials; and if we were improperly to reject such testimony, society would soon fall into a lamentable condition indeed. Who commits a crime in the personal view of witnesses? Who commits the crime of murder when others look at him? Who administers poison in the face of positive testimony? No, gentlemen of the jury, the great majority of all crimes are detected, and the offenders convicted by circumstantial evidence. Thus it ever has been, and thus it ever will be. 515

This court is well aware of some crude and singular notions of certain men, in reference to this kind of testimony, especially where a case of murder is concerned, the penalty being death. These notions we know are sometimes honestly entertained by honest men, but they are founded upon empiricism. They grow out of the fact that there have been convictions of murders, founded upon so called circumstantial evidence, and the innocent victims have suffered death.

In the history of the conviction of crime, these cases have been comparatively few, and if you should well examine, you will find the fault, in most of them, was not to be attributed to the facts circumstantially detailed, but to the loose inferences and hasty conclusion of juries from these facts.

Convictions have been had on slight circumstantial testimony—testimony which should not have convicted, but such as should at once have acquitted the prisoner. The victims of such ignorance of juries and courts have suffered the penalty, innocently; and because of such ignorance, shall you wholly reject this kind of testimony? That would be folly, indeed. And let me add, too, that the history of criminal jurisprudence presents some innocent victims of direct testimony, where the element of perjury has consigned innocence to infamy, disgrace and death; and because of this shall we therefore reject positive testimony? No one could say so. Indeed, were we profoundly to philosophise on this subject, we might say that all human testimony is at best uncertain. But we should remember that we are only human beings, the subjects of human law, knowledge and order, the subjects of human testimony, and on this we must act.

Circumstantial testimony is often regarded as even stronger and better than direct—to speak of circumstantial testimony in its proper sense, and not of the stupid inferences and conclusions drawn by ignorant minds. “It is not often that the taint of perjury can be detected in evidence strictly circumstantial. Facts rarely can be forged, and the existence of a number of concurrent circumstances proved by distinct witnesses, which, when joined together, form a complete case, puts out of the question the suspicion of fraud.” So speaks well a learned author. (The court here added a lengthened extract from note in Wharton’s Criminal Law, p. 199.) 516

But you must exercise a proper and particular care in reference to circumstantial evidence, and let not your minds hastily adopt conclusions, nor yet inconsiderately reject them. Let your intelligence, founded on your daily observation and experience in the ordinary course, and usual order of human events, direct you in your inferences. Let good common sense be your guide in this; always careful to observe this principle

of law, that no person is to be convicted on circumstantial evidence, so long as there is any reasonable hypothesis on which the innocence of the defendant may be based.

And now, gentlemen, with these cautions as to the facts of the case, the first question to be settled by you is this—

Is *James Wesley Forrest* dead?

This question will not require much investigation, for it is proven by direct, positive testimony, and we believe admitted by the defense.

Secondly. What was the cause of his death?

This point brings you to the consideration of all the testimony detailed, bearing on the sickness and the death of James Wesley Forrest—the testimony of the physicians, and the other witnesses as to the symptoms exhibited—the burning of the throat—the heaving and vomiting—the character of the vomits—the pains in the stomach, and the death in convulsions. Then the *post mortem* examination and the evidences at that time found in the condition of the stomach—the patches of inflammation—the enlargement of the duodenum—the erosion of the rectum—the liquid on the stomach—the appearance of the skin—all these, with the learned opinions of the physicians thereon expressed, you will take into consideration—as likewise the second *post mortem* examination—the evidences then exhibited, the cutting out of the rectum, and above all, you will give attention to the facts conducing to the chemical analysis, and the chemical analysis itself—demonstrating the existence of arsenic—all these facts, with the order and detail of things transpiring in connection, you will carefully examine, and adopt conclusions to which the testimony, circumstantial, scientific and positive, brings your minds.

If you arrive at the conclusion, at this point, that arsenic or any
617 other poison occasioned the death of James Wesley Forrest, your next inquiry, one of the greatest importance, will be,

Who administered the poison?

Was it administered by anybody, or was it taken through mistake or misadventure? These questions you will settle by a careful examination of the testimony. Was it administered, as in the language of the indictment, by the prisoner at the bar? On this point you cannot be too careful. Take all the evidence, circumstantial and positive, bearing on it, and investigate it separately and collectively.

It is not the design of this court to recapitulate this testimony. The facts are for you to settle; the law to be applied is to be furnished by the court. We consider that the province of the court is to give the law—yours to investigate the facts, and decide on your verdict. If the court were to attempt to recapitulate the facts, they could not well avoid giving their coloring to them, and thus in a measure usurp the peculiar province of the jury. They think it, therefore, safer in all cases for the rights of the defendant, to permit the facts to be submitted to a jury of twelve minds, and not to one, and thus preserve inviolate the trial by jury.

Do each and every one of the circumstances detailed in the testimony and taken together conduce to the same conclusion? Is there a link absent in the chain of circumstances? Is the circumstantial fabric complete in all its parts?

Do the circumstances detailed look to another person as the sole guilty one? Because more than one may be guilty of this charge, and if Nancy Ferrer administered the poison, or was connected with the guilt of the transaction, she is to be found guilty by you!

Who had the opportunity to commit the crime? Whose conduct was suspicious in the transaction? Who made expressions and declarations about it? Who purchased the arsenic?—and under what circumstances, and with what statements? Who made declarations about the death of the deceased? Who leaned over the table in anxious solicitude at the *post mortem* examination? Who manifested, by conduct and behavior, knowledge of the transaction? Who made pretenses of vomiting? Who did not take the poison in the family, where the death occurred? All these enquiries, and many others of like nature, it is for you to settle; and what is most important, who had motive to commit this crime? For black deeds as light ones, are done from motive. Motive is the main spring of human conduct, and without it no one can act for good or for evil. Nay, even a lunatic acts not without a semblance of it. But if you can find no particular motive—who had the wicked malice to commit this act? Who was so utterly regardless of social duty, and so fatally bent in mischief as to poison James Wesley Forrest? Examine well all these things minutely and particularly. 818

If they lead your minds to conclude Nancy Ferrer administered this poison, and thus caused the death, whether by one dose or continuous administering, you will so adopt the conclusion without regard to consequences.

If, in your examination, you still entertain a reasonable doubt, that doubt must go in favor of the prisoner, and you will not find her guilty, unless you can do so beyond reasonable doubt; and as to what a reasonable doubt is, we adopt the language of one of the supreme judges of our state to the effect that a “verdict of guilty cannot be returned without convincing evidence. The law is too humane to demand conviction while a rational doubt remains”—and it was considered a reasonable doubt existed, if material facts in the case, without which a conviction could not be had, might be reconciled with innocence.

This language we adopt. If you settle the preceding question by the answer that Nancy Ferrer administered the poison, and thereby caused the death of J. W. Forrest, then you come to the great, last and most important question,

Was *Nancy Ferrer* insane when she did the act?

If you resolve this last question in the affirmative, the defendant must be acquitted on the ground of insanity.

But on this enquiry your very careful consideration is earnestly required. You will examine well all the detailed evidence touching on the subject—you will examine the opinions of her neighbors, and those in frequent intercourse with her—of those in the same condition in life, and weigh well the facts as to her behavior and character. Examine her life and history as has been detailed to you; look to her parentage and to her nurturing—at the circumstances by which she was surrounded in early and later life—look at her disposition, and at the influence which the misfortune of her deformity exerted. Scrutinize, too, the opinions of the learned physicians;—for you will readily observe that, learned as they are, their opinions need careful scrutiny.

This court has once said in this case that in this progressive state of the world, in all things, they would not undertake to say what is true medical science or what is not; but to protect the rights of the defendant and the state, under well known rules of law, they admit the opinions of all learned physicians in this important subject of insan- 819

ity. The defendant is entitled to them—the rights of a free community are entitled to them. It is for you, gentlemen, to judge of the facts elicited by the testimony, and you will give it the great weight it deserves.

But the special and particular ground of defense is *imbecility*. The counsel for the defense contend that the girl Nancy is an irresponsible being—that she is an imbecile, who cannot distinguish right from wrong; and that if she did this act, it was an act of imbecility, or rather as they say, of imbecility educated to do this very act. It is for you to examine all the testimony upon this subject, with especial attention to the following points of law:

1. Every individual charged with the commission of an offense, is presumed to be sane. Every individual charged with the crime of murder, by poison or otherwise, over the age of childhood, is presumed to be sane until the contrary be shown when the plea of insanity is set up.

2. The burden of proving insanity or imbecility rests upon the defendant; and formerly it was holden, that unless this was proven to satisfy the minds of the jury beyond reasonable doubt, the jury should not so conclude it. This doctrine, though useful in its time, this court considers as too hard to uphold, and they charge this as the law upon the subject.

3. That when insanity is set up, the defendant must prove it affirmatively. But it is for the jury to conclude upon the proof offered; and if on due consideration, they find a preponderance of evidence in favor of insanity, at least in *favor of life*, it is their duty to find the existence of insanity. To apply this to this case, if from the testimony you find a preponderance of evidence, not in number of witnesses, but such evidence as to produce the conclusion in your minds that the defendant was insane when she committed the act charged, then it is your duty to find in favor of insanity.

But what do we mean by the term insanity, or imbecility, in its truly legal sense?

Insanity, in the general legal sense, is an inability to distinguish between *right* and *wrong*.

As applied in this case, particularly, this is the question for you to settle.

Was Nancy Ferrer at the time this act was committed capable of judging whether this act was right or wrong? And did she know at
620 the time, that the act was an offense against the laws of God and man?

If you say “nay,” she is innocent—if “yea,” and you find the other elements of the case to be true, she is guilty as charged in the indictment. Now, insanity exists in so many shapes and forms, it is almost impossible for science to comprehend it, but this is a plain, legal definition; and she or he who administers poison to kill, and knows at the time that it is wrong so to do, is guilty of murder in the first degree.

So far as the girl Nancy is concerned, you will carefully examine all the testimony touching her knowledge of right and wrong, and if you find she was able to distinguish between them, then no matter of how low an order may be her intellect, how degraded her morals, or how depraved her character, she is guilty as charged; if you have no reasonable doubt as to her commission of the act. If you find that she could not distinguish between right and wrong, and did not know this act to be wrong, at

the time of its commission, you will return a verdict of "not guilty—for the reason of insanity."

If you find against the defendant, you may say on what count of the indictment, or if you find the facts of the case applicable to all the counts, you may return a verdict "guilty of murder in the first degree, as charged in the indictment."

Take the case, gentlemen, and with scrupulous attention to what has been said to you by the court; give it a calm, deliberate, solemn, serious investigation; and unmindful of legal consequences, mindful of your oath, return a true verdict upon the facts; and may an all-wise providence preside over your deliberations.

Verdict, guilty.

Messrs. *A. J. Pruden*, and *P. A. and P. McGroarty*, for the state.

Messrs. *R. B. Hayes* and *J. F. Hoy*, for the prisoner.

The prisoner, on a subsequent day, was sentenced to be executed on the 25th of June, 1852; but upon the allowance of a writ of error by the district court, returnable before the supreme court in banc, the execution of the sentence was suspended, until the case should be there heard and determined.

ARREST IN CIVIL ACTION.

521

[Marion County Court of Common Pleas, March Term, 1852.]

EVERETT MESSENGER V. ORIN LOCKWOOD.

Affidavit to hold to bail—Constitutional law—Non-imprisonment act.

If the affidavit to hold to bail, though in the words of the statute, set forth the facts from which the affiant deduces his inference that the contract was fraudulent, and it appears to the court that those facts do not warrant such an inference, the defendant will be discharged on common bail.

Under the 15th section of the Bill of Rights, an arrest cannot be made, in a civil action, on the ground that the defendant is not a resident of the state of Ohio.

Dictum of METCALF, J., that where in an affidavit to hold to bail, fraud is charged, the facts must, under the 15th section of the Bill of Rights, be set forth.

ASSUMPSIT.—This is a motion made by defendant to be discharged from arrest, on filing common bail.

On the 19th of February, 1852, the following precipe and affidavit were filed by plaintiff, upon which a *capias* was issued, and the defendant taken into custody.

"Issue a *capias ad respondendum* to sheriff of Marion county, returnable at next term, and endorse "Suit brought by plaintiff to recover of the defendant two thousand dollars, sustained by the said plaintiff by reason of a breach of a contract entered into by the said plaintiff and the said defendant, on the 10th day of January, A. D. 1852, by which the said defendant promised to purchase and receive from the said plaintiff five hundred head of full fed, fat cattle, and pay to said plaintiff three dollars per hundred, live weight, therefor. One hundred of said cattle to be delivered in January, and one hundred head in each succeeding month, between the fifth and fifteenth of each month, and pay to said plaintiff three hundred dollars upon receipt of the second one hundred head, to be by him retained until the delivery of the last one hundred head, etc.

Marion County Court of Common Pleas.

To the clerk of Marion common pleas."

Hold to bail in the sum of \$4,000.

The said Everett Messenger makes oath, and says that the said Orin Lockwood has committed a breach of the contract described in the within precipe in this. That he did not receive the said one hundred head of fat cattle, which, by the terms of said contract, he promised to receive between the fifth and fifteenth days of February, A.D. 1852; but wholly neglected and refused to do so. Nor did the said Orin Lockwood pay the said plaintiff for said one hundred head of fat cattle, nor for any part thereof. Nor did the said Lockwood pay said three hundred dollars to said plaintiff, as by the terms of said contract he was bound to do. Whereby, and by reason of the breaches of said contract in neglecting and refusing to receive the said one hundred head of fat cattle, so to be by said defendant received from said plaintiff, between the fifth and fifteenth days of February aforesaid, and to pay said plaintiff the said several sums of money aforesaid, the said Everett Messenger says that he has sustained damages in the sum of two thousand dollars, or more; and that said sum of two thousand dollars, or more, and more than one hundred dollars remains due and unpaid. And that he, the said Everett Messenger, holds the same as a just demand against the said Orin Lockwood; and that the liability aforesaid was incurred by said Orin Lockwood, in fraud of the rights of this affiant, as above set forth; and affiant further saith that the said Orin Lockwood is not a resident of the state of Ohio, as the said Orin Lockwood informed this affiant, and this affiant verily believes.

EVERETT MESSENGER.

Sworn to and subscribed before me, this 19th day of February, A. D. 1852.

J. R. KNAPP, Jr., Clerk.

Messrs. Bowen & Durfee, in favor of the motion to discharge, made the following points:

1st. Since the non-imprisonment act of 1838, a *capias ad respondendum* cannot issue for the recovery of unliquidated damages in any case, except for breach of marriage contract. That by the laws of the statute, there must be a *debt* or *demand* justly due to the plaintiff, by stipulation in the contract, or an arrest cannot be made.

2d. The affidavit is argumentative, not certain, and consequently invalid. *Casburn v. Reid*, 2 J. B. Moore, 60; *Broadhead v. McConnel*, 3 Barbour's S. C. R., 175.

3d. The 15th section, art. 1, of the new constitution prohibits all imprisonment for debt in civil cases, except for fraud; and to authorize imprisonment, the affidavit or proof made at the foundation of the writ, must disclose the facts which constitute the fraud. And without a clear showing of fraud, in reference to the contract sought to be enforced, no arrest can be made.

Messrs. J. & S. H. Bartram and Powell, for Plaintiff.

BY THE COURT. This is a motion to cancel the defendant's bail bond to the sheriff, and to discharge him on common bail. And the very decided interest manifested by counsel on both sides of this motion, is not less justified by the amount of money in controversy, than by the very grave question of personal liberty involved in it.

That our law, as heretofore administered, has not required the same nicety and absolute certainty in the affidavit upon which a *capias ad respondendum* is issued, as is required by the practice of the English courts, has ever seemed to me as reflecting no great credit on our guaranties of personal liberty. Nor have I ever been able to discover why less evidence should be required to authorize the issuing of this writ, than is required for the issuing of a *ca. sa.* The language of the statute, as applicable to the two writs, differs but slightly. In the one case, the language of the statute requires the party applying for the writ, to *establish* the *intended* frauds by his affidavit. In the other, he is to satisfy the court by his own and other evidence of its existence. Now, if this question were an open one, I should not hesitate for a moment to determine that, in either case, the contemplated fraud, with the evidence of it, must be set forth in the affidavit, in order that the officer or court to whom it is addressed, might determine whether in *fact* the fraud contemplated by the statute did exist? But the supreme court has decided that an affidavit for this writ, couched in the language of the statute, is sufficient; and hence, that it is unnecessary to set out in the affidavit, the evidence upon which this is founded. If this affidavit, therefore, contained simply the statement, that the obligation for which suit was about to be brought, was incurred in fraud, it would be good in that particular. But it does more. It is averred that it was contracted in fraud, "as above set forth." The circumstances of fraud are there set forth, though not required so to be. And being so set forth, it certainly becomes the duty of the court to determine whether those circumstances do authorize the resort to this writ. The plaintiff himself has been unwilling to make the unqualified affidavit that the obligation was incurred in fraud, and hence has qualified it by saying that it was contracted in fraud in a particular manner, and that manner is set out in the precept and affidavit. Now, while it is true, and the supreme court has so held, that the party may swear to a conclusion at which he has arrived, by a process of reasoning, and on facts known only to himself, and upon that affidavit obtain the writ, it is equally true that that court never has held, that where he has set forth those facts and that reasoning, and on examination they are found insufficient to justify the conclusion, that the writ will be **824** allowed.

In the affidavit before us, the facts are set forth, and the conclusion sworn to in these words, "that the liability aforesaid was incurred by the said Orin Lockwood in fraud of the rights of this plaintiff as above set forth." The precept and affidavit simply set forth a contract by which the defendant bound himself to receive a certain number of fat cattle, and pay for them a certain sum of money, and then assign the breach that he refused to receive and pay for them. There is no other circumstance of fraud shown; and I must confess that I have been utterly unable to discover any thing in this refusal, and failure to pay, more fraudulent than that occurring daily, and hourly of persons failing to pay their debts due upon notes, bonds, etc., when the same fall due. It is a simple failure, on the part of Lockwood, to comply with a written agreement into which he had entered, without any other circumstance of fraud. And this is, in reality, all that the plaintiff swears to. Nor would a prosecution for perjury lie against the plaintiff here, except by contradicting the truth of the statements contained in the body of the precept and affidavit as constituting the entire facts from which he draws his conclusion. We conclude, therefore, that this affidavit is clearly

insufficient under the law of 1838, "to abolish imprisonment for debt," to hold the defendant to bail for fraud in the contracting of the liability.

The other cause assigned in this affidavit for the writ of *capias* is, that the defendant is a non-resident of the state of Ohio.

The 15th section of the first article of the constitution declares, "That no person shall be imprisoned for debt in any civil action, on *mesne*, or final process, unless in cases of frauds." This provision is contained in the bill of rights, and is an explicit declaration that the people have reserved to themselves the sacred boon of personal liberty, and have denied to the government all control over their persons, except for the commission of crimes, and the isolated case of fraud in their business transactions. This declaration is regarded as an ample safeguard, without either legislative or judicial construction, and admits of no such thing by either the one or the other departments of the government. And I have no doubt, at all, but what it will be hereafter held by all the courts, and without any further legislation, that every affidavit for a *capias* must contain upon its face not only the fact that the debt or demand exists, and its nature and amount, but also the very facts
 525 constituting the fraud for which the *capias* is allowed. Fraud is treated both by the legislature and the convention as in its nature criminal. It is for this reason that arrests for this cause are tolerated, and it will not be allowed that, without a specification of the facts and proof of them, citizens shall be placed beyond the protection of the bill of rights and have their bodies incarcerated, simply because some frightened or hard creditor may believe that they intend to commit a fraud. Much less will the incarceration of a man's body be tolerated, simply because he does not reside in the state of Ohio. This may be looked upon as a most grievous misfortune, but I can hardly think it will very soon be adjudged to be a crime.

The motion to discharge on common bail must prevail, and the defendant be discharged.

49

TESTIFYING AFTER CONVICTION.

[In the District Court of Ohio, Third District, Wood County, 1852.]

Before Corwin, P. J., and Hall and Palmer, JJ.

ORLANDO EVANS v. THE STATE OF OHIO.

[Reported by JAMES MURRAY.]

*Construction of gambling act—Testifying after conviction and before sentence—
 Arrest of judgment.*

Where a person is indicted and convicted under the act for the prevention of gaming (Swan's Statutes, 426; 29 Laws, 442), but before sentence is called upon by the state to testify, and does testify in another cause, in regard to the same offense it is the duty of the court to arrest the judgment and discharge the defendant

This was a writ of error to Defiance common pleas, returnable to Wood district court. The facts of the case fully appear in the opinion of the court.

Messrs. Spink & Murray, for plaintiff in error
Mr. S. M. McCord, prosecuting attorney, for

CORWIN, J. It appears from the record in this case that the defendant was indicted, under the act for the prevention of gaming, for playing a certain game called poker, for a certain sum of money, and was convicted thereof, and that after such conviction of the court, he was called upon by the state to prove all the facts of the offense for which he had been convicted; and for this cause he moved the court for a reversal of judgment. The motion was overruled, and a judgment was rendered against him. To reverse that judgment is the duty of the court. The 12th section of the act for the prevention of gaming (Swan's Statutes, 428; 29 Laws, 442), provides, "who hath been guilty of any of the offenses in this act called upon on the part of the state, and shall not be indictable or punishable for any of the facts of the offense by such witness done and disclosed."

The legislature have thus created a distinct offense and punishment; and if the witness testifies at a trial where punishment has actually commenced, he is entitled to a reversal. The statute is in derogation of the common law, and is strictly construed. The intention of the legislature evident from the words of the statute is, that if the witness is called upon and does criminate himself, consequences may result to him from so doing, from which he is to be preserved. Can any injury, then, result to him from testifying after conviction, but before sentencing him to the affirmative? He may have been convicted by the court on insufficient testimony; he is called upon to prove his innocence, and his doom is sealed. Again: the evidence developed on his own trial, may be such as to amount to a mere nominal punishment. He is committed to the state, and thus it may be, bring upon his own head the punishment of the law. It seems to us evident, that if a witness testifies in behalf of the state, and does testify, to the commission of an offense by him done and committed, he is saved from that offense, or if a prosecution has been commenced therefor, it is discharged therefrom, at any time previous to the trial of the case. For these reasons, the court of common law is of opinion to arrest the judgment, and for that error the judgment is reversed.

Judgment reversed.

51

COMMERCIAL LAW.

[In the District Court of Ohio, Third District, Wood County, 1852.]

Before Corwin, P. J., and Hall and Palmer, JJ.

SAMUEL CLYMER v. JAMES F. STUBBS.

[Reported by JAMES MURRAY.]

Bills of exchange—Notice to indorser—Mistake in name of postoffice.

Where the name of the postoffice and that of the town in which the indorser resides are different, and no special notification has been given to the holder requiring him to send to a certain *postoffice* by name, it will be sufficient notice of the protest and non-payment of a bill of exchange, to send a letter by mail, directed to the *town* where the indorser resides, and where the postoffice is situated.

The facts are stated in the opinion of the court.

Messrs. Young & Waite, for plaintiff in error.

Messrs. Spink & Murray, for defendant in error, cited *Downer v. Renner*, 21 Wendell, 10; *Renner v. Downer*, 23 Wendell, 620; *Seneca County Bank v. Neass*, 3 Comstock, 442; *Bell v. The State Bank*, 7 Blackford, 450; *Bank of Columbia v. Lawrence*, 1 Peters, 578; *Bank of Manchester v. Stanson*, 13 Vermont, 334; *Rand v. Reynolds*, 2 Grattan, 171.

CORWIN, J. It appears from the bill of exceptions in this case, that suit was brought in the court of common pleas, by the defendant in error, against the plaintiff in error, as indorser of a bill of exchange, payable at the Commercial Bank of Toledo. That the defendant in error, on the trial of the cause, made due proof of presentment and non-payment; and that notice thereof was, on the same day, sent to plaintiff in error, by depositing a letter, stating said facts, in the postoffice at Toledo, Ohio, directed to "Samuel Clymer, *Otsego*, Wood county, Ohio," where he then resided. The plaintiff in error then proved that there was no postoffice in that county called *Otsego*, but that there was a *town* of that name, at which there is a postoffice called *Weston*, and that letters and papers frequently came to the postoffice at Perrysburg, directed to *Otsego*, which were uniformly sent to the *Weston* postoffice. The court below, on this state of facts, gave judgment for the then plaintiff; and we are now asked to reverse that judgment. From the facts appearing

52 in the case, we can see nothing tending to show that the plaintiff in error failed to receive the letter by due course of mail, or that he was otherwise injured by the direction on the letter. In any event, we are fully satisfied that the rule of the common law is, that in the absence of any special notification to the contrary, notice of protest sent by mail, directed to the town where the party resides, is sufficient. The notice, therefore, in the present instance, was sufficient to authorize the judgment of the court of common pleas. That judgment is, therefore, affirmed, with five per cent penalty.

Judgment affirmed.

The case was argued on behalf of the plaintiff by *Messrs. King & Woods* and *Thomas Ewing*; and on behalf of the defendants by *Messrs. L. Case* and *J. R. Stanbery*, who cited *Key v. Vattier*, 1 Ohio R., 132; *Weakly v. Hall*, 13 Ohio R., 167; *Gardner v. Adams*, 12 Wendell, 297; Story's Equity Jurisprudence, section 1048, note; Hillard on Sales, 339.

STILLWELL, J., sustained the demurrer for all the reasons assigned—relying principally, however, upon the second cause; and judgment was rendered for the defendants.

64

MUNICIPAL CORPORATIONS.

[In the District Court of Ohio, Fifth Circuit, Hamilton County, September Term, 1852.]

Present: Mr. Chief Justice Caldwell, and Messrs. Justices Carter, Matthews and Piatt.

THE LITTLE MIAMI RAILROAD COMPANY v. GEORGE MARTIN,
ADMINISTRATOR.

WRIT OF ERROR TO HAMILTON COMMON PLEAS.

[Reported by MR. JUSTICE MATTHEWS.]

Charter of Cincinnati—Power to change the grade of streets—Liability of municipal corporations—measure of damages—Construction of the law of evidence—"Immediate benefit"—Stockholder's interest.

The resolution of the city council of Cincinnati, of 1841, authorizing the Little Miami Railroad company to lay the railroad track in the streets of the city, does not alter the grade of those streets.

By the city charter, the power to change the grade of streets is vested exclusively in the council, and can be exercised by them in no other manner than by virtue of their ordinances.

Municipal corporations are liable for injuries done to individuals, occasioned by the acts of their agents, although those acts are authorized by law, and required by the general interests of the community.

In estimating the damages for an injury done to a private person by changing the grade of a street, regard must be paid not merely to the difference between the selling price immediately before and after the grading, but to all other circumstances which naturally affect the value of the premises.

In an action against a money corporation, the defense is not made for "the immediate benefit" of a stockholder, and he is, therefore, under the Ohio statute, (48 Laws, 33; Curwen's Statutes, chapter 975), a competent witness for the corporation.---[EDITORS OF W. L. J.]

MATTHEWS, J. This was an action on the case, brought in the court of common pleas, for damages occasioned to the real estate of the defendant in error, abutting on Front street, Cincinnati, by the elevation of the street by the plaintiff in error for the purpose of laying down the track of the Little Miami railroad. The verdict below was for the plaintiff for \$465, and the case is brought up on error.

The defendant claimed not to be liable, on the ground that the change of grade, which was the cause of the injury alleged, was authorized by the city council of Cincinnati, by resolution. The resolution relied on was passed in 1841; gives the railroad company the privilege

of laying their track on the street, on condition that they repave, etc., "and pay all damages that may arise to individuals in any change of grade, etc.; the work to be done under the direction of the city surveyor and the trustees of the third ward, who are to act under the direction of the city council." At the time of the passage of this resolution there was an ordinance in force fixing the grade of this street. 55

The first error assigned is, that the court erred in refusing to instruct the jury that, if they believe the grading was done under the direction of the city council, or a committee appointed for that purpose, and the Little Miami Railroad company merely elevated the rails and street to suit the grade so established by city council or their agents, this action cannot be sustained.

We think there was no error here. The resolution relied on, it is apparent, does not alter the grade of the street. It refers the question of change entirely to the discretion of the company, which it is clear the city council had no authority to do. It is equally clear that they could not legally authorize a change of grade by resolution. The charter is express as to this. The section relied on for the contrary position (page 41), gives the council exclusive power to establish and regulate the grades of the wharves, streets and banks along the Ohio river. This, by omitting to mention in what way this power shall be exerted, does not conflict with, or repeal the previous section of the same enactment, which expressly requires the establishment of grades of all streets to be by ordinance.

The next error complained of is that the court erred in refusing to charge the jury, that an injury to the real estate of an individual occasioned by changing the grade of a street by the city council or their agents, if honestly done for the public convenience, will not sustain an action for damages.

The instruction asked would have been clearly erroneous, and is in direct opposition to repeated decisions of the courts of this state. It is well settled in this state, that a municipal corporation is liable for injuries occasioned by the acts of its agents, although authorized by law and the general interests of the community.*

The court was also asked to charge that the limit of the plaintiff's damages was the difference in the selling price of his lot, immediately before and after the alleged injury. The court refused this, and charged, on the contrary, and we think very properly, that this difference in price ought to be considered, but not to the exclusion of every thing else. A man has a right to the reasonable use of his property, and is not required to sell. Besides this, the mere difference referred to is not necessarily an index of the amount of injury. Other things may be operating at the same time upon the price of real estate in general, or that particular piece, which ought to be taken into consideration. 56

The most serious question in the case arises upon a ruling of the court, excluding a witness offered by the plaintiff in error, who, it was admitted, was a stockholder and director in the corporation sued, and involves, in an important particular, the construction of the statute of March, 1850, to improve the law of evidence.†

*See the cases collected in a note to *Goodloe v. Cincinnati*, 4 Ohio R., 500, Emerson's edition; 8 Western Law Journal, 118; Curwen's Statutes, 522.

† 48 Laws, 33; Curwen's Statutes, chap. 975.

By the third section of that statute, "no person offered as a witness shall be excluded by reason of his or her interest in the event of the action; but this section shall not apply to a party to the action, nor to any party for whose immediate benefit such action is prosecuted or defended, nor to any assignee of a thing in action, assigned for the purpose of making him a witness."

Was the rejected witness a party to the action? A party to the action is one who is named upon the record as suing or being sued. To say that the corporation is, in fact, but the sum of its stockholders, and its name but an "*alias*" for its individual corporators, is a great confusion of legal ideas. A stockholder, and the corporation of which he is a member, are distinct legal entities. They are separate persons. Their interests, instead of being common, are always distinct, and frequently adverse. A man cannot sue himself, although it frequently happens that he has a representative capacity, in which his interests are adverse to his individual claims. Neither can he sue a firm of which he is a partner; but he may sue or be sued by a corporation in which he owns all the stock. The corporation represents *the fund*, which alone, when it is sued, the opposite party expects to subject to the satisfaction of his claim; when a judgment goes against a natural person it binds all his property.

Each inhabitant of a *municipal* or *quasi* corporation is a party to the suit brought against the corporation, because each inhabitant is directly liable in his person to arrest, and in his goods to seizure and sale, on the execution which may issue against the collective body by that name; and hence, because he is a party to the suit, his admissions and declarations as to the matter in controversy are receivable in evidence; yet the members of these political divisions, in the nature of corporations, at common law, on grounds of public policy, although parties to the action and interested in its event, were held admissible as witnesses. Stockholders in private corporations, however, were not allowed to testify in their behalf; not because they were parties to the action, for their admissions were not testimony against the company, but on account of their interest in the result of the suit. The witness then was not a party to the action.

Was he properly excluded on the ground that the suit was defended for his *immediate benefit*? The distinction, in the mind of the legislature, was not between an interest which was remote and contingent and one which was direct, certain and vested, because that distinction was recognized previously, and needed no re-enactment. The *immediate benefit* contemplated by the statute to disqualify a witness, is a gain resulting to him personally, as the immediate and necessary consequence of the judgment itself, operating directly, *and not through any medium*, upon his pecuniary condition. If he is the person for whom, in fact, the action is brought or defended; if, in consequence of the judgment, he is made at once inevitably richer or poorer, then his interest excludes him, for he is, in reality, a party to the suit, though not named on the record.

A stockholder in a private corporation is undoubtedly interested in the event of every action brought against it. If it is sued, he may and certainly will derive a benefit from the establishment of a successful defense. But that benefit is not *immediate*; it is a benefit which remains and results on a final settlement of the affairs of the company, and becomes manifest in the increased, or rather undiminished fund, then to be divided among all the stockholders. If it necessarily affected the cur-

rent rate of dividends, or the present market value of it might, perhaps, be said to receive an *immediate* benefit.

The statute under consideration is a remedial one, and construed with liberality. Its object was to throw open before the doors for the admission of testimony, and to repose trust of justice rather upon the credit of the particular witness than the competency of classes. It would limit its beneficial operation greatly not to apply it in cases like the present.

We have not been able to find any decision upon the point, although Lord Denman's act is substantially the same.* The language in the English act is, "for whose immediate and individual behalf," instead of "for whose immediate benefit."

Under this act, it has been decided that a creditor for an assignment has been made to a trustee by the debtor is a competent witness for the trustee, in an action brought by him against the creditor of the debtor, who had levied upon the goods of the debtor. The question was as to the validity of the deed. *Black v. Jones*, 8 Law and Equity R., 559.

Also, that a person entitled to a share in the proceeds of a sale to A., in trust for sale, is a competent witness in an action brought by A. to establish his right to the land. *Harding v. Hodgkins*, 12 Law and Equity R., 462.

In a case before Tindal, L. C. J., the action being upon a contract, against one of the contractors, there being no plea in bar, it was held that a co-contractor, against whom a previous judgment had been recovered on the same cause of action, was a competent witness for the plaintiff. *Cupper v. Newark*, 2 Carrington and Kirwan's English Common Law R., 24.

In an action of assumpsit against a joint-stock company, if the members are partners, a person who was a member at the time the contract was made, but not at the time suit was brought, but who was a partner at the time the judgment was given, might be made liable to the payment of the judgment of the court, was admitted as a witness for the defense. *Lane v. Lane*, 12 Meeson & Welby, 569. And this was before the Lord Denman's act.

In *Sage v. Robinson*, 18 London Law Journal R. (N. S.), 31; 3 Welsby, Hurlstone & Gordon, 142; 12 London Jurist, 142. The court of Exchequer, the court is reported as saying, that the question is "a person in whose immediate and individual interest an action is brought or defended, either wholly or in part," and that declarations be receivable against the party on whose behalf the action is brought, to give evidence? 6 Harrison's Digest, 636.

The difference between a partnership and a corporation is a very material question. The members of the firm are each liable for all its debts. Not so with the stockholder. His interest in a suit brought against the company in which he owns stock, is not so great as that of a creditor in favor of a debtor, against whom the company brings a claim; at any rate not greater than that of a partner in a firm, whose compensation depends upon its profits.

*See the English cases collected and commented on in 9 Western Law Journal, 326, 499.—Eds.

Upon reason and authority, we are of opinion that the witness was improperly excluded, and that on that account, the judgment must be reversed.

Judgment reversed.

Messrs. Fox, French & Pendleton, for the Plaintiff in Error.

Messrs. Samuel M. Hart, and Geo. E. Pugh, for the Defendants.

66

CRIMINAL LAW.

[In the District Court of Ohio, Fifth District, Hamilton County, September Term, 1852.]

Before Mr. Chief Justice Caldwell, and Messrs. Justices Carter, Matthews and Piatt

HELMERKING V. THE STATE OF OHIO.

WRIT OF ERROR TO THE COURT OF COMMON PLEAS—INDICTMENT FOR GRAND LARCENY.

[Reported by T. F. THRESHER.]

Arrest of judgment—Separation of jury before verdict.

Judgment can only be arrested for errors apparent on the face of the record.

After the jury have separated, in the criminal case, they cannot be recalled to alter or amend their verdict, nor to pass on counts in the indictment upon which they have omitted to find a verdict.

The indictment contained two counts. The first count charged the defendant with grand larceny, and the second, with receiving stolen goods. The jury returned a verdict of "guilty on the first count," taking no notice whatever of the second count. The next case was then called, and the same jurors sworn, with the exception of one, who was challenged and dismissed, but who remained in the court-room, and mingled with the bystanders. During the trial of this later case, and about an hour after the former jury had been dismissed, it was discovered that they had omitted to pass upon the second count of the indictment; whereupon the trial was suspended, and the jury in the former case recalled, that they might be inquired of concerning their verdict. Upon the jurors conferring among themselves, it was discovered that they had not made up a verdict on the second count, their attention not having been called to the necessity of finding upon it; and having, by order of the court, retired to the jury-room, they returned a verdict of "guilty on the first count, but not guilty on the second." The court ordered this to be entered as the verdict of the jury, and the former verdict to be set aside. The defendant objected that no verdict could
67 be received after the jury had separated, and the objection was made a part of the record by bill of exceptions.

Motions were afterward made for a new trial, and to arrest the judgment. The motion for a new trial was withdrawn before argument. The motion in arrest of judgment was overruled, and judgment entered on the verdict.

Mr. Chief Justice CALDWELL delivered the opinion of the court, and held that —

Judgment can be arrested only for errors apparent on the face of

the record. This record was made up in such a way that the jury had separated before the verdict was rendered in it. There was, therefore, no ground to assign for this error.

As to the other error assigned, the court held that after a jury have rendered the verdict in a case and separated, they cannot be recalled to alter or reconsider the testimony adduced before them, uninfluenced by the verdict. It seems indispensable that the verdict should stand separate. Jurors always feel at liberty, after being sworn by the court, to converse freely with the parties in the case; and they thus receive impressions which influence their opinions. And notwithstanding the rule now treated, it seems to the court that the error in *Ohio*, 11 Ohio R., 472, which excludes the influence on the minds of jurors from influence of the verdict, is the only safe one. As the jury separated in this case before receiving their verdict, and for this error the judgment is reversed.

In *Sargeant v. Ohio*, the court said: "After the verdict is rendered, whether it may have been rendered in open court, the control of the jury and of the court is at an end. The court cannot alter it, nor can the jury be recalled to alter it, nor might any other twelve men be called to alter it, as the office of the juror is discharged upon the acceptance of the verdict."

In civil cases, it is no error in the court to send the jury to render a verdict, after they have separated. *Sutcliffe v. Gilbert*.

APPEALS.

[In the District Court of Ohio, Third Circuit, Vinton County, Ohio,
Before Mr. Justice Thurman, Presiding, and Messrs. Justices
Whitman.

ROLCLIFF V. BECK.

*See *Morgan v. Stittigan*, *post*, holding a contrary rule.

[Reported by Mr. Justice NALBURN.]

Motion to dismiss an appeal—Requisites to perfect an appeal—Omission of court to fix penalty.

An appeal will be dismissed, when, in a case requiring the giving of a bond, the court omits to fix the amount of the appeal bond.

The statute makes certain acts conditions precedent to an appeal, and the court has no power to dispense with either.

The appellant should move the court to fix the amount of the bond. The fixing of the penalty is a matter in which both parties have a right to be heard.

The giving of a bond with ample penalty, fixed by the court, is not a condition precedent to an appeal, where the court omits to fix the amount of the bond.

Wilson v. Holeman, 2 Ohio R., 253; *Bliss v. Long*, 5 Ohio R., 490, approved and followed.

Mr. Clark, for Beck, moved to dismiss this case because the court of common pleas had failed to fix the amount of the appeal bond, the judgment below having been a judgment against the plaintiff for costs only. The record showed that the plaintiff had given notice of his intention to appeal by entering the same on the records or minutes of the court below; but that the court, the details of the law not then being known to the court and the parties, had failed to fix the amount of the appeal bond. A bond had been given by plaintiff in an amount fixed by himself or the clerk, within thirty days. There was no objection either to the penalty of the bond or the security. He cited *Bradford v. Watts*, Wright, 496; *Moore v. Brown*, 10 Ohio R., 197.

Messrs. Hall & Wilson, for plaintiff, contended that it was made the duty of the court to fix the penalty of the bond, when notice of appeal had been given, and that the party ought not to suffer from a failure of the court to perform its duty.

BY THE COURT. The present statute, 50 Ohio Laws, 93; Curwen's Statutes, chapter 1124; is, so far as giving notice of appeal, a copy of
73 the act of 1831, Swan's Statutes, 682, section 124; but it differs in this, that the court is required, in certain cases (of which the present case is clearly one), to fix the amount of the appeal bond, required to be given by the party appealing. The act of 1831 has repeatedly come under the consideration of the supreme court. That court uniformly held that a strict compliance with the condition of the statute was necessary to perfect an appeal. It has been also repeatedly held that the appellant must, at his peril, see that the proper entries have been made and the proper bond given. Hence, an omission of the clerk to enter the notice of appeal on the minutes of the court, though the party had given such notice, as the memorandum of the judge in the docket showed, was held to be fatal; as the statute made it the duty of the appellant to enter notice of his intention to appeal on the records of the court. So also, where the clerk had made a mistake in the amount of the appeal bond, in not making the penalty double the amount of the judgment below, the defect was held fatal and the appeal dismissed. *Wilson v. Holeman*, 2 Ohio R., 253; *Bliss v. Long*, 5 Ohio R., 276; *Bradley v. Smith*, 6 Ohio R., 490.

Let us apply these decision to the case before us. In this case, the notice was entered; but the court failed to fix the penalty of the bond. Still no appeal is authorized except upon the conditions laid down in the statute; and one of these conditions has not been complied with. No bond has been given in a penalty as fixed by the court; but the party has given a bond in a penalty fixed by himself. The giving a bond in a sum fixed by the court, is a condition precedent to the vacation of the judgment below and the perfection of the appeal; and how can this court change the statute by giving the party an appeal on giving a bond in a penalty fixed by himself?

But it is contended that this omission of the court to perform its duty should not prejudice the party. It is made the duty of the court to fix this sum whenever notice of appeal has been given. But it is to be remarked, that the entering of this notice is the act of the party, and need not be brought to the attention of the court. It may be done at any time during the term, and hence after the daily minutes have been read and signed by the presiding judge. How, then, is the court to fix this penalty unless on motion of the appellant? If we sustain this

appeal, we must hold that a party entering his notice of appeal on the last day of the court, and entering it too at the foot of the entry of a previous day, may perfect his appeal by giving bond in an amount to be fixed by himself; although the failure of the court to fix the amount shall have arisen from the neglect of the party to notify the court that such notice has been entered. The party appealing must see that all the prerequisites of the statute have been complied with. He wishes to appeal; he knows what the conditions are upon which his appeal can be perfected, and he must comply with them at his peril. This court has no power to waive any one of these conditions precedent, without in effect repealing *pro tanto* the statute. 74

We believe the appellant should be held to enter his notice, and then to move the court to fix the penalty of the appeal bond to be given. The opposing party has an interest in fixing the amount of this bond and has a right to be heard; since it is his security for his costs, and also for any penalty the court above may assess upon the appellant in case his appeal should be found to be vexatious or without reasonable cause. The amount of the costs above is mere matter of conjecture, and both parties ought to be heard and allowed to inform the court what may be their probable amount.

We feel compelled, therefore, both upon the adjudged cases and upon principle, to hold that an appeal cannot be sustained, unless the party appealing shows a complete compliance with the conditions of the statute; and hence the repeal in this case must be dismissed.

Appeal dismissed.

APPEALS.

[In the District Court of Ohio, Fifth Circuit, Hamilton County, September 28, 1852.]

Before Mr. Chief Justice Caldwell, Presiding, and Messrs. Justices Carter, Matthews, and Piatt.

FRANKLIN MORGAN V. JOHN STITTIGAN.

Motion to dismiss—Time of filing appeal bond—Omission of the court to fix the penalty.

This was a motion to dismiss an appeal that involved the construction of 50 Laws, 95; Curwen's Statutes, chapter 1124, which provides that "the party desirous of appealing his cause to the district court, shall, at the term of the court in which the judgment or decree was rendered, enter on the records of the court notice of such intention, and shall, *within thirty days after the rising of such court*, give bond, with one or more sufficient sureties, to be approved by the clerk of the court, or any judge thereof, in the penalty and with the condition hereinafter provided." "In all cases in which the judgment or decree is personal against any party for the payment of money only, the penalty of the appeal bond shall be double the amount of such judgment or decree; in all other cases, including cases in which the judgment or decree is against any party for nominal damages and costs, or for costs only, *the court shall*, at the time of the 76

rendition of the judgment or decree, *ascertain and fix the penalty of the appeal bond*, to be given in the event of an appeal, at such reasonable amount as shall, in the opinion of the court be sufficient to cover any probable loss, damage or injury, which the other party or parties may sustain by the delay, and the costs and damages which may be awarded in the appellate court."* Held that—

The words "thirty days after the rising of such court" should be understood to mean full thirty days after the day on which the court adjourned, and that, therefore, a bond given on the thirtieth day was sufficient. The case of *Steinbarger v. Steinbarger* (19 Ohio R., 106), does not conflict with this view of the statute.

The words "the court shall ascertain and fix the penalty of the appeal bond" devolves a duty on the court, and if notice of appeal is given and a bond taken in the court below, it is not competent to either party to make the objection that the court below has failed to perform its duty in omitting to fix the amount of the penalty; for it was a duty which was to be performed without the motion of either party.†

Motion denied.

APPEALS.

LOWRENZ V. PENN AND OTHERS.

Chancery practice—Appealing part of the case.

Where, under the sixth section of 43 Laws, 126, Curwen's Statutes, chapter 614, a party against whom a final decree is taken, appeals his separate part of the suit, the case as to the other parties, is not before the appellate court.

The case of *Brown v. Haines*, 12 Ohio R., 1, cited and distinguished.

This cause came into the district court on an appeal from the commercial court of Cincinnati, upon a decree of dismissal as to the respondent, Penn, of the complainant's bill.

76 *Messrs. King & Anderson*, for Complainants.
Messrs. Jolliffe, and Coffin, for Respondents.

Mr. Justice CARTER delivered the opinion of the court.

The bill and supplemental bill were filed in the court below against Robert C. Brasher, Elisha Vance, Hanson L. Penn, Lewis Dalzell & Co., and the Ohio Life Insurance and Trust company. The answers of respondents were filed, and the case was delayed from time to time until the October term, 1850, of the commercial court; the cause came on to be heard as to the respondent, Penn; and the court being of the opinion that the equity of the case was with the said Penn, it was decreed that the bill as to Penn should be dismissed at the costs of complainants. Upon this decree notice of appeal was entered by complainants, and in July, 1851, the appeal bond was filed and the cause appealed from this decree.

At the last term of this court a motion was made by the respondents to dismiss the appeal so made, and the court, without expressing an opinion as to the position of the cause in reference to others than Penn,

* 50 Laws, 93; Curwen's Statutes, chapter 1124.

† See the preceding case of *Rolcliff v. Beck*, page 72, to the contrary.

overruled said motion ; and now here the cause coming on to be heard, it is the opinion of this court that the case of the complainants is here only in reference to the respondent, Penn ; and as anomalous and irregular as it may appear, the case as to the other respondents is still pending before the commercial court, and is not here for adjudication.

We shall not comment upon the action of the court below in reference to the irregularity of the proceeding of hearing the cause as to only one of the respondents, for it may have possibly been that the circumstances of the case in justice and equity demanded it. It is sufficient for us to know that, so far as Penn was concerned, there was a final decree rendered in the cause ; his interests were definitely settled by the decree.

In such a case it would not do to deny the right of appeal in the respondent, though in this case the respondent does not appeal, and equally so with the complainants. Nor would it do, the case having come on, to be heard as to one party, and his rights determined by a final decree, to defer his right of appeal until the suit was finally determined as to the other parties ; for this would be destroying in effect the right of appeal in such a party altogether. But we have a statute upon this subject, the sixth section of the act amending the mode of proceeding in chancery, passed March 12, 1845, which says : " Any party to a suit in chancery may appeal his separate part of the suit ; in which case the court from which the appeal is taken, shall direct the amount and the condition 77 of the bond on appeal." *

In this case, to be sure, the complainants appeal this part of the suit ; but if the above section gives the right to the respondent to appeal his separate part of the suit, in such a case as this the right certainly must also belong to the complainants. At all events the complainants in this suit appeal the case so far as Penn is concerned, and they cannot complain if they only bring up a "separate part of the suit."

We are referred to a decision in 12 Ohio R., p. 1, in the case of *Brown v. Haines*, which is claimed as an authority in point to call upon this court to take jurisdiction of all the parties in this cause. The language of the court there is: "There is no doubt but this is such a final decree in the cause, affecting the rights of Haines, as warrants the appeal ; besides the objection now comes too late." It was upon this latter clause of that sentence that the decision was made in that case ; and if we look at the first clause of the sentence, we find it placed upon the ground that it was a final decree as to the interests of Haines, as well as Carr ; and Carr and Haines executed the appeal bond. The appeal bond in this case was executed by Slevin for the complainants, and the condition of the bond has reference to the dismissing of the bill as to Penn only.

There is another view of this question which might be taken, as to the appellate jurisdiction of this court in such a case as this. If we took jurisdiction of the other respondents, other than Penn, would it not be taking original jurisdiction as to them in a proceeding which commenced in the commercial court, and can only come here by appeal ? The rights and interests of the parties defendant have not been decided upon at all in the court below ; there has been no decree as to them, and indeed not even a final decree. We could only get jurisdiction of them by final decree and appeal, as laid down by statute. This has not been done ; their case is not here.

* 43 Laws, 126 ; Curwen's Statutes, chap. 614.

The hearing, then, is on the bill of complainants and answer of Penn, and the replication; and in the absence of testimony, the bill must be dismissed as to Penn at complainant's costs.

Bill dismissed as to Penn.

78

APPEALS.

MANNYPENNY v. JOHNSON.

Construction of 50 laws, 93; Curwen's Statutes, chapter 1124—Appeals to district court—Judgments obtained before the statute passed—Voluntary nonsuit.

This was a motion to dismiss an appeal for want of jurisdiction.

Mr. Pugh, Attorney General, *Mr. A. E. Gwynne*, and *Mr. Worthington*, for the motion.

Messrs. Gholson, and *Taft & Mallon*, resisting it.

Mr. Chief Justice CALDWELL delivered the opinion of the court and held—

That an appeal lies to the district court in all cases where the court below had original jurisdiction, except in cases of voluntary nonsuit. The words of the statute are, that "wherever the testimony shall be arrested from the jury, by reason of which the plaintiff becomes nonsuit, the plaintiff shall have the same right to appeal as in other cases."

Where a judgment had been obtained before the passage of the act of March 23, 1852, 50 Laws, 93; Curwen's Statutes, chap. 1124, the case might be appealed under this statute. This construction does not give a retroactive effect to that law. To give a right of appeal is only to afford a new remedy, and it is competent for the legislature to do that.

Motion denied.

ERROR.

BATES v. LEWIS.

Practice—Writs of error to the common pleas—Construction of 43 laws, 80; Curwen's Statutes, chapter 586, section 6, and of 50 laws, 102; Curwen's Statutes, chapter 1133.

This case came before the court upon writ of error. *Messrs. Fox, French & Pendleton*, for the Defendant in Error, moved to dismiss the suit for want of jurisdiction. The writ had issued as a matter of course, under the act of March 12, 1845, 43 Laws, 80; Curwen's Statutes, chapter 586, section 6, without an allowance by the court.

Messrs. Taft & Mallon, resisting the Motion.

BY THE COURT. The act of April 30, 1852, 50 Laws, 102; Curwen's Statutes, chap. 1133, sec. 1, provides that "all process and remedies authorized by the laws of this state, when the present constitution took effect, may be had and resorted to in the courts of the proper jurisdiction, under the present constitution." The issuing of the writ in this case "as a matter of course," was therefore proper; 43 Laws, 80; Curwen's Statutes, chap. 586., sec. 6; the motion must therefore be overruled. 79

Motion overruled.

APPEALS.

PUGH V. CORWINE.

Practice—Appeals to district court—Filing the record above—Failing to file the record on the first day of the term—Construction of 50 Laws, 93; Curwen's Statutes, chap. 1124, sec. 9.

THIS case came before the district court on appeal from the superior court of Cincinnati. The transcript of the record below was not filed until the second day of this term.

Messrs. Coffin & Mitchell, moved to dismiss the appeal for want of jurisdiction.

Messrs. Pugh & Pendleton, resisted the motion.

BY THE COURT. The statute provides that when appeal shall be granted from the court below, "the clerk of such court shall forthwith make out an authenticated transcript of the docket or journal entries, and of the final judgment or decree made and rendered in the case; which transcript, together with the original papers and pleadings filed in the cause, he shall deliver into the office of the clerk of the district court, on or before the first day of the term thereof, next after perfecting the appeal." 50 Laws, 95; Curwen's Statutes, chap. 1124, sec. 9.

This requisition of the statute is directory to the clerk. His omission to perform his duty cannot affect the jurisdiction of the court.* Where the clerk of the court below neglects to file the papers of the cause appealed, as he is required by law to do, on the first day of the term of the district court next after the appeal is taken, the appellant may have the case docketed and the papers filed on a subsequent day.

Motion overruled.

*See *People v. Allen*, 6 Wendell, 486.—Eds.

WATER CRAFT.

[In the District Court of Ohio, Second District, Cuyahoga County, September Term, 1852.]

Before Mr. Justice Bartley, Presiding, and Messrs. Justices Humphreyville and Starkweather.

HILLYARD V. THE SCHOONER SPRAY.

Ohio water craft law—Proceedings in rem—Notice—Jurisdiction—Effect of judicial sale—Conflict of jurisdiction—Admiralty jurisdiction.

Mr. Justice BARTLEY delivered the opinion of the court, and held:

First—That under the law of this state for the collection of claims against steamboats and other crafts, as amended by the amendatory act of 1848, * a suit can be sustained against a vessel engaged in navigating the waters within and bordering upon this state, when seized or taken within the jurisdiction of Ohio, although it be for a cause of action which arose within another state.

Second—The water craft law of this state is *remedial* in its character, not creating a right, but affording a remedy for the violation of a right; and the power of the state, in its discretion, to enact laws, binding on the people and property of this state, on all subjects, property and people coming within its jurisdiction, and also to prescribe for its state courts such remedial laws as may be thought proper and requisite for the due administration of justice within the state, is not to be questioned either by the courts of other states or the courts of the United States.

Third—Proceedings and judgment under this law must, in obedience to the constitution and laws of the United States, be entitled to full force and effect in the other states.† Every person interested either as owner or otherwise in the vessel, may appear as a party defendant and appeal from the judgment in such proceeding. The law is considered as settled in the case of *The Mary*, by the supreme court of the United States, 9 Cranch, 126, that where proceedings are against the person, notice is served personally or by publication, but where they are *in rem*, notice is served on the thing itself; and this is necessarily notice to all
81 who have any interest in the thing, and sufficient to give full force and validity to such proceeding.‡

Fourth—The facts that a vessel is registered and licensed under the laws of congress for the coasting trade, and owned in part, or in whole in another state, can furnish no defense in such a proceeding. It is the seizure of the vessel within the jurisdiction of Ohio, and not the locality of the ownership, which confers jurisdiction. And the object of the coasting license having in view merely the American character of the vessel and the security of the revenue, it has never been pretended that this license in

*Swan, 208; Curwen's Statutes, chap., 301; 49 Laws, 101; Curwen's Statutes, chap. 1081.

†The decisions upon this subject are collected in a note to Curwen's Statutes, page 105.

‡See the case of *Glenny v. The Globe*, 8 Western Law Journal, 241, where Mr. Justice CONKLIN decided that a sale under the Ohio water craft law will not divest iens acquired in another state under the general admiralty law.

any manner affected the right of property, or interfered with the supremacy of state regulations or claims in respect to internal waters or commerce.

Fifth—That proceedings under this law of Ohio do not conflict with the admiralty and maritime jurisdiction of the United States courts, inasmuch as admiralty and maritime jurisdiction, from its very nature, and as understood and clearly defined at the time of the formation of the constitution of the United States, not only in this country, but throughout every maritime country of Europe, and as settled by repeated adjudications by both our national and state courts for a period of over sixty years, was confined to the high seas and within tide-waters.|| And the act of congress passed in 1845, extending the jurisdiction of the United States district courts to certain cases upon the lakes and navigable waters within the United States,†† may to some extent confer a concurrent jurisdiction assimilated in its character to admiralty proceedings, but cannot confer an exclusive jurisdiction. And after jurisdiction is acquired in a suit in the state court by the seizure of a vessel under the watercraft law of Ohio, it cannot be ousted or interfered with by any proceedings in the United States district court.

Messrs. Willson, Wade & Bishop, Backus & Noble, for Plaintiff.

Messrs. Foot & Newton, for Defendant.

CRIMINAL LAW.

82

[In the District Court of Ohio, Third Circuit, Pickaway County, June Term, 1852.]

Before Mr. Justice Thurman, presiding, and Messrs. Justices Bates and Norris.

BIRCH V. THE STATE OF OHIO.

Murder—The lesser offense included in the greater.

Upon an indictment for murder in the second degree, the jury may find a verdict of manslaughter.*

¶See the judgment of Mr. Chief Justice TANEY in the case of the *Propeller Genessee Chief v. Fitzhugh*, 9 Western Law Journal, 391, where the supreme court of the United States were of opinion that the admiralty and maritime jurisdiction of the federal courts is not, under the constitutional grant of jurisdiction to those courts, to be construed as extending only to cases arising upon the high seas or upon tide waters. It extends to all public navigable rivers, on which commerce is carried on between different states or nations, whether they be tide-waters or not.

††5 United States Statutes at large, 726.

* A case of this kind is reported in Plowden, 101. It occurred in 1553. John Vane Salisbury was indicted for murder. The jury found that "he killed the man, but not of malice prepense, and so they acquitted him of the murder, and found him guilty of manslaughter. And whether *John Vane Salisbury* should be utterly acquitted by this verdict, inasmuch as he was arraigned for murder, and is thereof acquitted, or whether the court should give judgment upon him that he should be hanged for the manslaughter, or whether this verdict should serve only against him for an indictment of manslaughter, and be of no other effect, or what else should be done with him, was privately considered and debated by the bench among themselves, and the opinion of the whole court was in a manner clearly, that they might give judgment upon him to be hanged for the manslaughter. For they held, that

ERROR.

WAYNE TOWNSHIP V. FLEMING AND OTHERS.

Writ of error—Misdescription of the court.

This was a writ of error, sued out of the "supreme court of Pickaway county," on the seventeenth day of February, 1852. There was no such court at that date. On motion, the case was ordered to be stricken from the docket.

Order accordingly.

CHANCERY PRACTICE.

MORGAN'S ADMINISTRATOR V. HAYES AND OTHERS.

Practice—Injunction to prevent sale of property pending litigation—Fraud—Insufficient affidavit—Construction of 46 Laws, 96; Curwen's Statutes, chapter 866.

The act of February 25, 1848, to amend "an act directing the mode of proceeding in chancery," authorizes the *plaintiff* in any suit at law for the recovery of money, or damages for any cause of action which would survive to or against the personal representative of the plaintiff or defendant; or the *complainant* in any suit in chancery for the recovery of any specific sum of money or damages; to obtain an injunction, to prevent the fraudulent disposition, by the defendant, of his property with a view of placing it beyond the reach of the plaintiff's judgment or decree. If the plaintiff in the one suit is not identical with the plaintiff in the bill seeking an injunction, no injunction will be allowed.

Where the affiant, in an affidavit to obtain such an injunction, swears to the fraudulent intent, and sets forth the facts, upon which his belief of the existence is founded, no injunction will be granted, if the court are of opinion that the facts, so set forth, do not warrant the inference of a fraudulent intention.

A debtor has a right to dispose of his property *bona fide*, to pay his debts; and the fact that he is hastening to do this with a design to prevent it being levied on by other creditors, who have obtained, or are about to obtain judgments against him, will not make such a disposition fraudulent.

the jury might give a verdict at large, and find the whole matter. As if one is arraigned for the death of a man, and he pleads, not guilty, the jury may find that he killed him in his own defense. And then here when he was arraigned for killing a man upon malice prepense, the substance of the matter was whether he killed him or not, and the malice pretense is but matter of form, or the circumstance of killing. And although the malice prepense makes the fact more odious, and for this cause the offender shall lose divers advantages, which he should otherwise have, as sanctuary, clergy, and the like, yet it is nothing more than the manner of the fact, and not the substance of the fact, for the substance of the fact is the killing him and then when the substance of the fact and the manner of the fact are put in issue together, if the jurors find the substance and not the manner, yet judgment shall be given according to the substance. As if a man arraign an assize for a disseizin with force, and the defendant pleads the general issue, and the jurors find the disseizin, but not with force, yet the plaintiff shall have his judgment, for the tortious expulsion was the substance, and the force the manner, and then when the substance is found, he shall have judgment for it; and shall be acquitted of the force. So the killing the man was the substance, and the malice prepense the manner, and then when the substance is found, viz., the killing the man, judgment shall be given upon it. But, although the court held in a manner clearly, that they might give judgment upon him for the manslaughter, yet they thought it good, and it was agreed, to reprieve the prisoner until the opinions of the other sages of the law were known. And therefore they did reprieve him."

This was a suit in chancery, under the act of February 25, 1848 (46 Laws, 96; Curwen's Statutes, chapter 866), additional to a suit at law to prevent the fraudulent disposition of the defendant's property pending the litigation. The suit at law was in the name of "John C. Drake, for the use of the administrator of John Morgan." The bill in chancery was filed in the name of the administrator of John Morgan.

The affidavit, accompanying the bill was as follows:

"The complainant makes oath that the said R. H. (defendant), in conversation with your orator and various other persons, pretended that the above claim of your orator was unjust, and that he would never pay it; that if your orator succeeded in getting it, he would make it cost your orator as much as it would come to. That after the commencement of your orator's suit at law, said R. H. commenced disposing of his property, and stated that he would pay his just debts, and let the rest go; in which conversation he pretended that your orator's claim was unjust; and that the said R. H. has been anxious, and has offered to dispose of the said lots in H.; and that during the last three or four years he has had no open and avowed claim to any property, except a home, or such property as could not be reached by execution."

BY THE COURT. It was held that the parties to the suit at law and in chancery must be the same. The right to an injunction is given to the plaintiff at law, or to the *complainant* in chancery. In this case the party who seeks an injunction is not the *plaintiff* at law, nor the *complainant* in chancery. This error is fatal.

The affidavit is not sufficient. It does not show a fraudulent purpose. *

Bill dismissed.

JUDGMENT LIEN—PARTITION.

PRITCHETT V. CRADLEBAUGH AND OTHERS.

Effect of partition on lien—Aid refused in equity.

This was a bill in chancery, averring in substance that the plaintiff recovered a judgment against A, which, at the time of filing the bill, was a lien upon certain lands of the defendant; namely, an undivided share in said real estate. That after judgment, proceedings in partition were had by the heirs, and the lands sold, and a deed made. That A died in Illinois, leaving no assets in this state, except the real estate aforesaid. That a foreign administrator was appointed, and the judgment revived against him; but no levy had ever been made. The bill prayed a sale of the premises to satisfy the lien.

BY THE COURT. It was held, that the judgment lien was not diverted by the proceedings in partition. That the lien of the creditor was a creature of the statute, and if he could not enforce it, in consequence of there having been no levy before the debtor's decease, equity, upon the facts stated, would not aid the creditor.

Bill dismissed.

*See *Holbird v. Anderson*, 5 Durnford & East, 235; *Riches v. Evans*, 9 Carrington & Payne, 640; 1 Story's Equity Jurisp., section 370.

APPEALS.

HALSTEAD V. SAWYER.

Road appeals—Construction of 49 Laws, 116; Curwen's Statutes, chap. 1104, sec. 4.

Under the act of March 25, 1851, "further to amend the 'act for opening and regulating roads and highways,' " 49 Laws, 116; Curwen's Statutes, chap. 1104, sec. 6; it is error for the justice of the peace to sit with the jury in the capacity of a juror.

SETTLEMENT OF ESTATES.

PENNOCK AND OTHERS V. MILLER AND OTHERS.

Executors purchasing at their own sale—Keselling at an advance—Pursuing repugnant rights—Lapse of time, as against executors.

Executors had purchased an estate, sold on execution in favor of their decedent, and resold it, for their own benefit, at a profit, and did not account for the profit to the estate. The legatees of the decedent sought to charge the lands in the hands of the purchaser, who compromised with them. Such legatees cannot afterward overhaul the accounts of the executors, with a view of charging them with the profit made.

The lapse of eighteen years after the settlement of an executor's account, and receipts in full taken, is a strong, if not conclusive, circumstance against the relief sought.

The executors of J. H. sold lands mortgaged to him, on *scire facias*; purchased the same for themselves, and afterward sold them at a profit, to J. F. The legatees of J. H. filed a bill, more than eighteen years after the first sale, against the heirs of J. F., claiming the land as purchased of the executors with knowledge of the trust; but in consideration of a sum of money, paid them by the heirs of J. F., permitted a decree, quieting the title, to be taken against them. The legatees then filed a bill against the executors, claiming the advanced price for which they had sold the lands, and which had not been accounted for in their settlement made with the court, more than eighteen years before the filing of the bill. There had also been a settlement with the legatees thirteen years before the filing of the bill, and a receipt in full given by them; but the profit, made on the resale of the lands, had not been accounted for.

The answer of the defendants, under oath, and in response to the bill, averred that the legatees of the testator had knowledge of the purchase by them, and of the subsequent sale, at an advanced price, at or near the time of the transaction. It was proved that some of the legatees had knowledge of the sale of the lands and purchase and resale by the executors, eighteen years before the commencement of the suit; but
86 it was not clear from the testimony, whether they had knowledge of the profit made by the executors at the resale, as averred in their answer.

BY THE COURT. It was held, that a party could not pursue repugnant rights, and that the legatees, by their proceedings against the heirs of J. F., were barred of their remedy against the executors. That the lapse of time, under the circumstances, was a strong circumstance against the complainants, if not fatal to their case.

Bill dismissed.

PRACTICE.

[In the Montgomery, Ohio, Court of Common Pleas, Fall Term, 1851.]

Before Mr. Justice Hart.

[Reported from the Judge's notes.]

BOUCHER v. LINDSLEY.

RULINGS UPON QUESTIONS OF PRACTICE.*Security for costs—Continuance.*

Motion for security for costs, filed late in the afternoon of the day preceding the trial.

Plaintiff's Attorney. The motion is too late. My client is out of the state. I have no means of giving security at this late period.

Defendant's Attorney. You may continue the cause for time. I did not know that the plaintiff had left the state until yesterday.

Plaintiff's Attorney. I do not desire a continuance.

HART, J. The motion is too late. We will not compel the plaintiff to continue. This would be to allow the defendant to obtain a continuance at the plaintiff's cost. Nor will we nonsuit the plaintiff. Let the trial proceed.

Motion denied.

SUBSCRIPTIONS TO RAILROAD COMPANIES.

97

[In the District Court of Ohio, Third District, Wyandot County, October Term, 1852.]

Mr. Justice Corwin, Presiding.

JAMES GRIFFITH AND OTHERS v. THE COMMISSIONERS OF CRAWFORD COUNTY, AND THE OHIO AND INDIANA RAILROAD COMPANY.

[Reported by MR. JUSTICE CORWIN.]

Chancery—Multifariousness—Injoining public officers—Illegal taxing—Construction of local laws relating to Crawford county.

All the citizens of a town or county, upon whom an illegal tax is about to be levied, have a common interest to avoid the tax, and any one or more of them may sue in chancery on behalf of himself or themselves and the other inhabitants of such town or county. Such a suit is not open to the objection of multifariousness.

The jurisdiction of a court of chancery to interfere by injunction, when public officers are proceeding illegally, or improperly under a claim of right, to do an act to the injury of the rights of others, is well established.

By 44 Local Laws, 192, 46 Local Laws, 262, 47 Local Laws, 297, 48 Local Laws, 277, the commissioners of Crawford county are authorized and required to change the subscription directed by a vote of the people of the county to be made to

the Ohio and Pennsylvania railroad, and to subscribe to the capital stock of any company incorporated to construct a railroad passing through the town of Bucyrus. The change made to the Ohio and Indiana railroad, after a vote of the county to subscribe to the Ohio and Pennsylvania railroad, was according to law. The court, therefore, refused to injoin the issuing of bonds by the county commissioners, in compliance with the terms of the subscription, or to restrain the levying of a tax to pay the debt thus contracted.

The case of *Armstrong v. The Commissioners of Athens County*, 10 Ohio R., 235, as to multifariousness, disapproved and distinguished.

CORWIN, J.

98 This case is reserved from the county of Crawford for decision here.

The complainants, eleven in number, on November 9, 1850, filed their bill in the court of common pleas of Crawford county, showing, among other things, that they are citizens and resident taxpayers of said county, owning, respectively, several tracts of real estate situate in said county, and several amounts of personalty therein, subject to taxation. That, at the October election, 1848, a majority of the citizens of said county, on a proposition submitted to them for that purpose, by their votes, authorized the commissioners of said county to subscribe the sum of \$100,000 to the capital stock of the Ohio and Pennsylvania Railroad company, but that no subscriptions had been made under such authority. That such county commissioners have subscribed \$100,000 to the capital stock of the Ohio and Indiana Railroad company, and have issued bonds for the payment of \$10,000 of said subscription, and delivered them to said railroad company, payable in fifteen years, with interest at the rate of six per centum per annum. That the directors of said company are about to negotiate said bonds, to raise money to build the road, and that said commissioners were to meet on the 23d November, 1850, for the purpose of issuing bonds to secure the payment of the balance of the stock so subscribed. That said subscription was an unconstitutional and otherwise invalid act.

The bill prays the allowance of an injunction to restrain the issuing of any more bonds upon said subscription, and the negotiation and sale of those already issued, and the levying and collection of any tax for the payment of principal or interest on account of said bonds. A provisional injunction, as prayed, was allowed by the president judge of said court.

The answer of the railroad company, protesting that said bill is multifarious, and its matter not a subject of equity jurisdiction, admits the subscription of stock and the issuing of bonds, as charged, and claims that said subscription was authorized and required by the act of the general assembly of Ohio, passed March 23, 1850, entitled "An act to authorize the commissioners of Crawford county to subscribe stock in railroad companies."

After a series of intermediate proceedings, which it is not necessary here to notice, at the March term of said court of common pleas, 1852, a decree was rendered dissolving said injunction and dismissing the bill; from which decree an appeal to this court has been perfected, and it is now submitted for our consideration.

It is objected to the exercise of chancery jurisdiction in this case.

99 First—That the bill is multifarious; and the case of *Armstrong v. The Treasurer of Athens County*, 10 Ohio R., 235, is cited in support of this position. While we respect the decisions of that court, and feel bound to adopt them as our rule of decision, until they are over-

ruled, yet it may be remarked that this point was not made in the pleadings nor argued by counsel in that case, and the rule there laid down is in direct conflict with all the other authorities upon the subject, and with the well established practice of our own courts in analogous cases. It is a most common and familiar practice for several creditors, having entirely separate and distinct claims, of whatever variety of character and amount those claims may be, to join in one proceeding to reach the effects of their common debtor; and we think it would be difficult to suggest any good reason, founded in principle or sound policy, why the holders of realty in Athens county derived from a common source, and claimed to be subject to a common exemption from taxation, as one of the incidents of title by which each tract is held, should not be permitted to join in one proceeding to test that single question, but should be driven to a multiplicity of actions to accomplish that one purpose. Considering the rule, however, to be settled by that case, we think the present case is clearly distinguishable from that, in this: that in the Athens county case, the tax *had been levied*, and the bill sought merely to injoin its collection from either of the complainants; and although the court might say in such a case, that each party could have his remedy in trespass or otherwise for the collection from him of an illegal tax, that neither of the parties had any interest in the question of the collection of the tax from the other; yet the levying a tax upon a county affects the whole county alike; it is a question of common interest and concern, affecting alike all the subjects of taxation in the county, although the holders of them may not have a joint or exactly equal interest therein. If the doctrine contended for by defendants' counsel be true, then it would be incompetent for all the inhabitants of a county to unite in one proceeding to restrain their own commissioners from levying an illegal or unjust tax upon them. We are satisfied to say that all of the citizens of a town or county, upon whom a tax is about to be levied, have a common interest to avoid the tax, and any one or more of them may sue, in chancery, on behalf of himself or themselves, and the other inhabitants of such town or county. This bill is not liable to the objection of multifariousness.*

But it is also contended by defendants,

Second—That the bill does not present a case for equity juris-
diction. We consider, however, that the jurisdiction of a court of chancery to interfere, by injunction, when public officers are proceeding, illegally, or improperly under a claim of right, to do any act to the injury of the rights of others, is established by numerous well adjudged cases.†

And this brings us to the consideration of the question whether this subscription of stock by the commissioners of Crawford county has been

* Story' Equity Pleadings, sec. 112, 113, 114 and 121; Mitford's Pleadings, 408; *Cooper v. Alden*, *Corning v. Lawrence*, 6 Johnson's Chancery R.; *Fellows v. Fellows*, 4 Cowen's R., 682; *Attorney General v. Heclis*, 2 Simmons & Stewart.

† *Mohawk and Hudson River Railroad v. Archer*, 6 Paige, 88; *Oakley v. Trustees of Williamsburg*, 1 Paige, 264; *Gardner v. Trustees of Newberg*, 2 Johnson's Chancery R., 162; *Belknap v. Belknap*, 1 Johnson's Chancery R., 463; *Cooper et al. v. Alden*; *Bonaparte v. Camden and Amboy Railroad Company*, Baldwin's Circuit Court R., 205; *Corning v. Lawrence*, 6 Johnson's Chancery R., 440; *Livingston v. Livingston*, 1 Johnson's Chancery R., 497; *Shand v. Aberdeen Canal Company*, 2 Dow, 519; *Bradley v. Comas*, 2 Humphrey R., 428.

made in pursuance of law, or whether it is an assumption of authority on their part, the exercise of which it is our duty to restrain.

On the 26th of February, 1846, the legislature passed an "act to authorize the commissioners of Knox and other counties to take stock in a railroad." By the terms of this act the county of Crawford, among others, was authorized to become a subscriber to an amount not exceeding \$100,000, to the capital stock of any company theretofore, or which might thereafter be incorporated, to construct any railroad which, of itself, or in conjunction with other companies, might open a direct communication through the county, and to or near its county-seat. But before the commissioners could subscribe the stock, the question of subscription was to be referred to the qualified voters of the county at the annual spring or fall election, and receive the consent of a majority thereto. Local Laws, vol. xliv., page 192.

On the 24th of February, 1848, the "act to incorporate the Ohio and Pennsylvania Railroad company" was passed, with power to construct a railroad from the town of Mansfield, in Richland county, eastwardly, by the way of the towns of Wooster, Massillon and Canton, to some point in the eastern boundary line of Ohio, within the county of Columbiana, thence to the city of Pittsburg; and from said town of Mansfield, westwardly, by the way of Bucyrus in Crawford county, until it intersects the west line of the state of Ohio, at such point as may be determined by said company to be most eligible. The general railroad law of 1848 is made a part of this charter. Local laws, volume XLVI, page 262.

101 On the 20th of March, 1850, "the act to incorporate the Ohio and Indiana Railroad company" was passed, with capital stock to the amount of \$2,000,000, and authority to construct a railroad, commencing at a suitable point to be selected by said company on the Cleveland, Columbus and Cincinnati Railroad, near Sultzer's tavern, in the county of Richland; thence to Bucyrus, in the county of Crawford; thence to Upper Sandusky, in the county of Wyandot; and thence, on such route as the directors of said company, or a majority of them, may select, to the western line of the state of Ohio, and thence to Fort Wayne in the state of Indiana.

The fourth section of this act provides "that the county commissioners of any county through which said railroad may be *located*, by and with the consent of a majority of the legal voters of such county * * * be, and they are hereby authorized and required to subscribe, in the name and for the benefit of such county, to the capital stock of said company any sum not exceeding \$100,000," etc. Local laws, volume XLVII, page 297. This charter is also subjected to the restrictions of the general railroad act of February 11, 1848. Curwen's Statutes, chapter 817.

On the 23d of March, 1850, "an act to authorize the commissioners of Crawford county to subscribe stock in railroad companies" was passed and took effect. The first section directs "that the commissioners of Crawford county be, and they are hereby authorized and required to *change* the subscription heretofore authorized by a vote of the people of the county to be made to the Ohio and Pennsylvania railroad, and to subscribe to the capital stock of any company or companies which is now or may hereafter be incorporated to construct a railroad commencing or terminating at any point in, or passing through, or adjoining the town of Bucyrus, the county seat of said county, the sum of \$100,000." Local laws, volume XLVIII, page 277.

"An act regulating the mode of proceeding where county commissioners may be authorized by law to subscribe to the capital stock of railroads turnpike roads, or other incorporated companies of this state," was passed and took effect February 28, 1846. General Laws, volume XLIV, page 82. Curwen's Statutes, chapter 694.

The first section of this law enacts, "that whenever the commissioners of any county in this state *shall, hereafter*, be authorized to subscribe to the capital stock of any railroad * * * it shall be the duty of said county commissioners to give at least twenty days' notice, in one or more newspapers printed and of general circulation in the county authorized to make such subscription, to the qualified voters of said county, to vote at the next annual election to be held in the several townships * * * for or against the subscription, as aforesaid, and if a majority of the electors aforesaid, voting at said election, for or against a subscription as aforesaid, shall be in favor of the same, such authorized subscription may be made, *but not otherwise*." 102

The "act regulating railroad companies," above referred to (General Laws, vol. XLVI, page 40), prescribes the manner of organizing, and becoming ready to transact business.

Five of the corporators named are authorized to open books for subscriptions to the capital stock of the company, by giving notice, and as soon as \$50,000, or ten per cent on the capital stock is subscribed, they may give notice for a meeting of the stockholders to choose directors, a majority of whom, after being chosen, form a quorum for doing business, to make by-laws, etc. They may elect a president, secretary, and treasurer, and after taking an oath to faithfully discharge their duties, they become an organized company, and may proceed to survey, locate and construct such road as their charter authorizes to be made.

The question whether the power conferred by these several acts might be exercised consistently with the provisions of the late constitution of Ohio, is considered as settled by the Clinton county case, decided at the recent term of the supreme court, and is not now urged by counsel. But it is claimed that the act of February 28, 1846, above referred to, is in no sense repealed by the act of March 23, 1850, but that the powers conferred by that last named act must be executed in conformity with the provisions of the act of February 28, 1846; that both statutes must be taken together, and considered as *in pari materia*, and that no subscription could be made under the act of March 23, 1850, unless such subscription was first authorized by a vote of the people had according to the provisions of said act of February 28, 1846. This proposition has been argued by counsel at great length, and with consummate ability, and after giving to it that consideration which the importance of the question and of the interests involved require, so far as our opportunities have allowed, we have brought our minds to the conclusion that the act of March 23, 1850, does not necessarily repeal, and has no necessary connection with the act of February, 1846; the object and effect of which is merely to prescribe the terms and restrictions upon which *subsequent delegations of authority to make county subscriptions* to railroad and other companies should be exercised. The act of March 23, 1846, does not profess to confer an *original power or authority* to make a subscription; it simply recognizes an *existing authority*, in the commissioners of Crawford county, to make a subscription of \$100,000, to the Ohio and Pennsylvania Railroad, and authorizes its *change* to a subscription of stock in the Ohio and Indiana Railroad company. It must be conceded, that in 103

the absence of the provisions of the act of February, 1846, or upon its express or virtual repeal, it is competent for the legislature to confer upon the commissioners directly, and without any vote of the people, authority to make this subscription; but they have not done so. The legislature, acting upon the fact, that at the October election, 1848, in pursuance of the act of February 24, 1848, to incorporate the Ohio and Pennsylvania Railroad company, and also in conformity with the provisions of the act of February, 1846, the people of Crawford county *had authorized* their commissioners to subscribe \$100,000 on their behalf to a railroad, and that the authority thus conferred had not been exercised, but still existed, simply changes the direction in which the authority thus conferred shall be exercised. The act of March 23, 1846, does not *create* an authority to make a subscription of stock, but expressly recognizing the existence of that authority, authorizes and requires a *change* of the subscription upon the terms and conditions specified in the act. The power conferred by the act of March 23, 1850, has been exercised; the subscription of railroad stock heretofore authorized by a law and by a vote of the people of Crawford county, has been "changed" to an investment in the stock of the Ohio and Indiana Railroad company; the liability of the county to pay the \$100,000 of stock so subscribed has thus been already created; \$10,000 of the bonds of the county by which such liability is evidenced, have been issued; and as these bonds create merely a formal obligation to pay a liability shown to exist, we see no reason to restrain the commissioners of the county from issuing a sufficient number and amount of such bonds to cover the liability created by the change of subscription.

The injunction heretofore granted to this case is therefore dissolved, and the bill dismissed at the costs of complainants.

Messrs. C. K. Watson & O. Bowen, for Complainants.

Mr. H. Stanbery, for Defendants.

122

MUNICIPAL CORPORATIONS.

[Hamilton, Ohio, Court of Common Pleas, October Term, 1852.]

PLATT EVANS V. THE CITY OF CINCINNATI.

[Reported by MR. JUSTICE MATTHEWS.]

Charter of Cincinnati—Obligation to pave streets—Liability of municipal corporations.

By the charter of the city of Cincinnati, the council are required to provide by ordinance for repairing the streets. This creates a legal duty in the city to have that work performed, and for neglect or refusal to perform it, an action lies in favor of any person injured thereby.

Municipal corporations are liable to actions, for injuries to individuals occasioned by their neglect or omission, in performing a corporate duty imposed upon the corporation by law, which is ministerial, and not discretionary in its nature, although no right of action is expressly given by statute against them.
—[EDS. W. L. J.]

MATTHEWS, J. This is an action on the case. The declaration alleges, that before and at the time of the committing of the grievances, etc., Western Row, between Court and Mason streets, was a public street

or highway within the corporate limits of said city, and that said city was required by law to keep the same open, in repair and free from nuisances; that the defendant from 16th June, 1850, to 16th June, 1851, carelessly and negligently suffered said street to become and remain greatly out of repair, and the pavement of the same to be worn through, etc., and also caused large quantities of wood, stone, etc., to be placed and kept on said street, whereby the same was obstructed; by reason whereof divers vehicles and horses of the plaintiff were greatly injured. 123

To this declaration there is a general demurrer:

The question raised by the pleadings in this case is, whether the city of Cincinnati is liable to a civil suit for damages occasioned to an individual by reason of the nonrepair of the public streets and highways within its corporate limits?

By the first section of the city charter, passed March 1, 1834, the city of Cincinnati is made a body corporate and politic, capable of suing and being sued in all courts and places, and in all matters whatsoever.

By the thirteenth section, it is provided that the city council shall cause the streets, lanes, alleys, public squares and commons of said city to be kept open and in repair, and free from all kinds of nuisances.

By section first of act passed March 16, 1839, and by the fifth and sixth sections of the act passed March 20, 1850, the council are required to provide for grading, paving, repairing, etc., any streets or parts thereof, etc., by ordinance, and also shall declare by ordinance the estimated expense of any such improvement, a charge upon the property bounding on the same, in proportion to the number of front feet of each parcel.

The general rule of law undoubtedly is, that where an absolute and unconditional obligation to perform a specific duty is imposed by the law upon any person, any one specially injured by the neglect to perform that duty is provided with a remedy for the wrong which he has suffered.

Lord Kenyon declared, that whenever the common law recognizes or creates a legal right,* it will also confer a remedy by action. And Lord Chief Justice Pratt said, that the special action on the case was introduced because the law will not suffer an injury without affording a remedy.†

Bacon (Abridgment, statute K., pp. 392, 393), lays down the law thus: As every statute made against an injury, mischief or grievance does impliedly give a remedy, the party injured, if no remedy be expressly given, may have an action upon the statute.‡

When a statute commands or prohibits a thing of public concern, the person guilty of disobedience to the statute, besides being answerable in an action to the party injured, is likewise liable to be indicted for the disobedience.§ If the thing commanded or prohibited by a statute can only be prejudicial to one or two persons, as if it be to repair the bank of a river, for want of having done which the ground of a certain person has been overflowed, no indictment lies; the remedy being an action on the case.|| 124

* 1 East, 226.

† Wiles, 581.

‡ 2 Institutes, 55-74; 10 Reports, 75.

§ Cro. Eliz., 635; 2 Inst., 131-163; 1 Hawk., chap. 22, sec. 5.

|| *Rex v. Pawley*, 2 Sid., 209.

While it is admitted that this principle is true, as a general rule, it is claimed that it has no application to municipal corporations—that while they may be made liable like individuals for breaches of corporate duty, as proprietors of estates and in all matters over which they are given control for the benefit of the corporation itself; yet, that as to other duties imposed on them, they are part of the government itself, erected for public and political purposes, and not liable, on any principle of law, for a breach of public duty in a civil action brought by a private individual. And it is further claimed that the duty of repairing streets falls within the latter class, the neglect of which cannot be made the foundation of a private suit.

The first case we are referred to is the *Mayor of Lynn v. Turner*, 1 Cowper, 86. This was an action on the case against the corporation of Lynn for not repairing and cleansing a certain creek, into which the tide of the sea was accustomed to flow and reflow, as from time immemorial they had been used, whereby the sea was prevented from flowing therein, so that the said creek was rendered unnavigable and the plaintiff obliged to carry his corn round about. The declaration consisted of nine counts; the second stated no special damages, but only charged generally that the plaintiff had lost the use of his navigation. Judgment by *nihil dicit*, and damages upon a writ of inquiry. Upon a writ of error the judgment was sought to be reversed on this argument; that it appeared from the record that the creek was navigable where the tide flows and reflows, and therefore a public highway; that where an injury is received by a nuisance or obstruction in a highway, it is incumbent on the party to show a particular damage, otherwise an action does not lie; that there being one count which did not allege special damage, and therefore bad, the judgment must be set aside.

To this argument Lord Mansfield replied, that it did not appear that the *locus in quo* was a navigable river; that the flowing and reflowing of the tide did not make it so, and for aught that appeared, the place
126 in question might be a creek on the private estate of the defendant, and therefore not a highway.

It thus appears, both from the argument of the counsel and the decision of the court,

1. That the defendant, a municipal corporation, was liable for not repairing a public highway, which it was bound to repair, if any special injury had arisen from the neglect.

2. That if the place was not a public highway, but a way through the defendants' estate which they were bound to repair, and which the plaintiff had a legal right to use, an action might be maintained for the mere obstruction of the plaintiff's legal right, without allegation or proof of particular damage.

The authority is clear that a municipal corporation is liable to an action for breach of such a corporate duty as the repair of highways.

The counsel for the defendant in the present case construes Lord Mansfield as deciding that the corporation of Lynn were liable in that action because the place in question might have been in their private estate, which they were bound to repair by reason of their tenure. But that is not the point of the decision. The remark of Lord Mansfield as to the way being in the private estate of the defendant was simply a reply to the difficulty raised by the fact that one count in the declaration alleged no special damage. If there had been such an allegation, and it had been admitted the way was a public highway, the corporation would

still have been declared liable. And it was expressly decided that it was not incumbent on the plaintiff to show any special reason or tenure why the corporation ought to repair. It was enough to allege and prove any legal obligation upon them to do so.

The next case is that of the *Mayor and Burgesses of Lyme Regis v. Henley*,* decided upon a writ of error in the House of Lords in the year 1834. The declaration alleged that the defendants were a corporation, created by letters patent from King Charles I, by which the king granted to them and their successors the borough or town of Lyme Regis, also a certain building called the pier quay, to the only proper use of the corporation, in fee farm forever, yielding a certain rent therefor, but releasing to the corporation part of an ancient rent, willing that the corporation should be thereof acquitted, and that they should at their own cost forever maintain and repair all the buildings, banks and sea-shores, etc., belonging to the borough, and the said pier quay, as often as should be necessary or expedient. The declaration then avers that the charter was duly accepted; that the plaintiff had a messuage and land in the said borough, abutting on the sea-shore, to which certain buildings, banks and sea-shores in the said borough, which the defendants were bound to repair, were a protection and safeguard, and hindered the sea from overflowing the plaintiff's land; that the defendants had wrongfully permitted them to be out of repair, by means whereof the plaintiff's house and land were inundated and injured. The question was as to the sufficiency of this declaration. 126

PARKE, J., in delivering the opinion of the judges, said :

"In order to make this declaration good, it must appear, first, *that the corporation are under a legal obligation to repair the place in question*; secondly, that such obligation is matter of so general and public concern that an indictment would lie against the corporation for nonrepair; thirdly, that the place in question is out of repair; and, lastly, that the plaintiff has sustained some peculiar damage beyond the rest of the king's subjects by such want of repair."

The only question was as to the first and second requisites. As to the second requisite, it was admitted that the repair of the highway or a bridge was a matter of public concern, because all the king's subjects may have occasion to use it; and the opinion of the judges was, that the repair of the places described in the declaration in that case, was also such a matter of public concern.

As to the first requisite, two objections were taken :

1. That the corporation had not, by the acceptance of the charter stated in the declaration, incurred any legal obligation whatever as to the repair of the place in question; that the charter does not contain a grant on condition that the corporation shall repair, but merely an expression of the king's will that they shall repair.

2. That whatever engagement the corporation may be under as between them and the crown, so as to render them liable either to a forfeiture of their charter, or any proceeding by the crown, yet that no stranger can take advantage of such engagement and maintain an action.

As to the first objection, the judges thought the charter did impose upon the corporation an obligation, which, by accepting the charter, they had adopted. As to the second, the opinion proceeds as follows :

* 1 Bing. N. C., 222; 27 English Common Law R., 366.

"It is admitted that if their liability arose by prescription they would be indictable, and also an action would lie for special damage, as in the mayor, etc., of *Lynn v. Turner*, 1 Cowper, 86; *Churchman v. Tunstal*, Hard., 162; *Payne v. Partridge* Show., 255; Carth., 191; and 127 many other authorities, which it is unnecessary to cite, because it is clear and undoubted law, that wherever an indictment lies for non-repair, an action on the case will lie at the suit of a party sustaining any peculiar damage. Now, we are unable to see any sound distinction between a liability by prescription and a liability arising within time of memory, but legally created. We do not say that prescription necessarily implies a charter or grant, but it necessarily implies some legal origin, and charter would be a legal origin. Suppose that a prescriptive obligation were alleged, and that a charter granted before time of memory were produced, and so the legal origin were shown, would that destroy the prescription? Certainly not. Would the obligation arising from the charter have been less binding within a few years after it was granted than it is now, after a great lapse of time? Certainly not. If, then, the origin be legal, how can it be important when it took place? We do not go the length of saying that a stranger can take advantage of an agreement between A. and B., nor even of a charter granted by the king, where no matter of general or public concern is involved; but when that is the case, and the king, *for the benefit of the public*, has made a certain grant, *imposing certain public duties*, and that grant has been accepted, we are of opinion that the public may enforce the performance of those duties by indictment, and individuals peculiarly injured by action."

This decision is a direct authority for the proposition in controversy in the present case, that a municipal corporation is liable to a civil action for nonperformance of a corporate duty imposed upon it by law, where special damage ensues.

An attempt is made to distinguish it from the case in hand by reference to the fact that stress is laid upon the circumstance that the charter is spoken of as a grant accepted by the corporation. This is true. But why is stress laid upon that circumstance? Simply to show that there existed the legal liability. The charter being a grant from the crown, had to be accepted before it became obligatory. But the charter of the city of Cincinnati is not a grant, which needs to be accepted. It is a public law, which is to be obeyed. The acceptance of the charter having imposed the legal liability, the consequence follows that a right of action accrues to each individual specially injured by the nonperformance of the duty. The same consequence would flow from any legal liability, imposed in any other way. Neither does the fact that the grant was 128 made for the benefit of the corporation, and that the duty to repair was not one of the duties devolved upon the corporation, in consequence of its public, political character, seem to make any difference as to the right of private action. Indeed, it is expressly declared that, in order to sustain such an action, the non-performance complained of must be of some public duty imposed for the benefit of the public, and which the public would have the right to enforce. The language of the authority is express, that, no matter how the liability arises, whether by the terms of an accepted grant or by prescription, or in whatever way, so it be a liability imposed by the law, a right of private action accrues from its breach, if it result in private and peculiar damage.

We are referred to the case of *Russell v. The Men of Devon*, 2 Term R., 667, as an authority in support of the present demurrer. This was an action on the case against the men dwelling in the county of Devon, to recover satisfaction for an injury done to the wagon of the plaintiff in consequence of a bridge being out of repair, which ought to have been repaired by the county. Two of the inhabitants, for themselves and the rest, appeared and demurred.

In support of the demurrer, it was argued that no such action would lie, because all suits must either be brought against individuals who are to be particularly named, or against corporations, or against persons who are rendered liable by the provisions of particular acts of parliament. The defendants in that case, it was contended, did not come under either denomination.

On the other hand, it was taken for granted that as against an individual or a corporation bound to repair the bridge, no objection could have been made to the action; and it was argued that the defendants could be sued in a civil action as well as they could be indicted.

Lord Kenyon, in delivering the judgment of the court, admitted the defendants were liable to be indicted, because that was sanctioned by the common law, but denied their liability in a civil action, *for want of the capacity to be sued civilly*—in other words, because they were not a corporation. If the inhabitants of the county had been incorporated, and endowed with the general capacity to sue and to be sued, being bound to repair bridges, they would undoubtedly have been held liable in the instance just referred to.

The distinction taken in this case, and on which the defendants were exonerated from liability, was between aggregations of individuals, called *quasi corporations*, which have a few limited duties and powers of a general nature, and those artificial persons known to the law strictly as *corporations*, which have a general capacity to 129 sue and be sued, and who, as to all their corporate property, powers and duties, are regarded by the law in the same light as natural persons. Such seems to be the voice of the law, established by the cases we have just examined, taken by Chitty. (Pleading, vol. I, page 76.) He says: "It is a general rule that corporations and incorporated companies may be sued in that character for damages arising from the breach by them of a duty imposed upon them by law.

"The *inhabitants of a county* are not a corporation, and therefore cannot be sued by that description for an injury occasioned by the neglect to build a public bridge, or for any other injury arising from the neglect of the county at large."

Chancellor KENT recognizes the same distinction between corporations proper and *quasi corporations*, the latter having no corporate fund, no general capacity of suing and being sued, and not being liable to any private action for neglect of corporate duty, unless given by statute.*

The same distinction seems to prevail in and govern the American cases, in which the point has been raised.

The case of *Mower v. The Inhabitants of Leicester*, 9 Massachusetts, R., 247, was an action on the case for the loss of a horse, occasioned by a defect in a bridge, which the defendants were bound to repair. By statute, all towns in Massachusetts are enjoined to maintain in good repair all highways within their respective limits; and in case of their neglect,

* 2 Kent's Commentary, 274, 278, 283.

and a special injury to an individual in consequence, they are made liable to double damages sustained thereby, after reasonable notice. The present was not an action upon the statute, but for single damages, without alleging notice of the defect and subsequent neglect. It was very properly decided that the action could not be maintained, because towns were not bound at common law to repair bridges, and even if they were, being merely *quasi corporations*, they could not be sued civilly, unless an action was given by a statute; and if an action was given, then the statutory remedy must be followed. Counties and towns in Massachusetts are precisely similar, so far as this question is concerned, to counties and hundreds in England.

In the case of *Riddle v. The Proprietors of the Locks and Canals on the Merrimack River*, 7 Massachusetts R., 186, the distinction between aggregate corporations and *quasi corporations* is drawn on the ground that 130 the latter have no corporate fund, while the case of the *Mayor, etc., of Lynn v. Turner* is quoted as settling that an action will lie against a corporation for neglect of a corporate duty, by which the plaintiff suffers.

A similar question arose in Connecticut, in the case of *Chidsey v. The Town of Canton*, 17 Connecticut R., page 475. A statute of that state made it the duty of the towns to keep in repair the necessary roads and bridges within their respective limits, and provides that if any person shall receive any damage to his person or to his property, in consequence of any defect therein, the town shall pay him just damages. The case referred to was brought for injuries received by the plaintiff's wife and daughter. The court decided the action could not be maintained by the plaintiff in his own name, because he had received no injury to his own person or property. The court says:

"We readily admit, that if the common law had made the defendants liable for injuries sustained in consequence of their defective bridges, or had the statute in general terms made them so liable, the plaintiff might recover; but as they are liable only to the extent prescribed by the statute, the plaintiff cannot recover, unless he brings his case within the provisions of the act."

The same question arose upon a statute of Maine, precisely similar, in the case of *Reed v. The Inhabitants of Belfast*, 20 Maine R., 246, and was decided in the same way.

These cases in Massachusetts, Connecticut and Maine, are simple reiterations of the principle of the case of *Russell v. The Men of Devon*, which we have already shown is no support for the present demurrer.

The same view seems to have been taken of this question in New York. In the case of *Bartlett v. Crozier*, 17 Johnson, 438, an attempt was made to recover damages from an overseer of highways, for an injury occasioned by a defective bridge. The action was defeated on the ground that there was no absolute duty in the overseer to repair bridges. He was simply bound, if he should happen to have money in his possession arising from fines and commutations, to apply it in improving roads and bridges. The duty was considered very imperfect and contingent, and resting much on discretion for its performance. The Chancellor remarks: "There is no certain, stable, absolute duty in the case. It is not like the case of an individual bound by a private statute, or by a certain tenure, to keep a road or a bridge in repair, nor like the case of turnpike companies."

The case of the *Mayor, etc., of the City of New York v. Freize*, 3 Hill R., 612, seems to be directly in point. It was an action on the case for special damage to the plaintiff, occasioned by the nonrepair of a sewer in the city of New York. The statute regulating the subject provided that it shall be lawful for the mayor of the city to cause common sewers to be made, and to alter, amend, and cleanse them, and to tax the expense thereof upon the owners of adjacent property, almost identical with the provision in the charter of the city of Cincinnati as to the mode of repairing streets, though not so imperative as to the duty. It was held by the court (NELSON, C. J.) that the power was not optional with the corporation, but peremptory, and its execution might be insisted on as a duty. "But independently of this principle," says the decision, "the duty which the defendants are charged with neglecting is quite obvious in another view. The sewers in question were constructed by the corporation under the powers conferred by the section of the statute already mentioned. If, therefore, we concede that the exercise of the power was, in the first instance, optional on the part of the corporation, yet, having elected to act under it, they must be held responsible for a complete and perfect execution. It would be highly unjust to allow that, after constructing these works, the corporation might refuse to keep them in repair, and thus leave the street in which they have been placed in a worse condition than before they were put there. The owners and occupants of houses and lots in the neighborhood having been charged with the expense of the sewers, acquired a right to the common use of them; and a corresponding duty devolved upon the corporation to keep them in proper condition and repair. This is too obvious to require either argument or authority."

The learned judge then proceeds to define the remedy, upon the principle established in the case of *Henley v. The Mayor and Burgesses of Lime Regis*, which he quotes at length, and with approbation. That principle is, that where a duty specifically enjoined upon a corporation, as such, has been wholly neglected by its agents, if an injury to an individual arise in consequence of the neglect, the corporation will be held responsible.

The same judge (NELSON), in the case of *Bailey v. The Mayor, etc., of The City of New York*, 3 Hill, 531, admits and explains the distinction between the different powers of municipal corporations, on which the counsel for the defendant in this case has relied in support of the demurrer. It is the distinction between such powers as are granted exclusively for public purposes, where the corporations have no private interest in the grant, acting in their exercise in their political capacity as one of the instruments of government, to which a share of the sovereign power of the state is assigned, and those powers conferred for the advantage and emolument of the corporators, though the public may derive a common benefit therefrom. In the latter case, the corporation stands on the same footing as would any individual or body of persons upon whom the like special franchises have been conferred. As if, for instance, banking powers, or power to build a railroad, should be conferred upon a municipal corporation. So far as the exercise of such powers is concerned, they would be regarded as a private company, and be subject to the responsibilities attaching to that class of institutions. "It is upon a like distinction," proceeds Judge NELSON, "that municipal corporations, in their private character as owners and occupiers of lands and houses, are regarded in the same light as individual owners and occupiers, and

dealt with accordingly. As such they are bound to repair bridges, highways and churches; are liable to poor rates, and, in a word, to the discharge of any other duty or obligation to which an individual owner would be subject." Here, while the distinction contended for is recognized, the duty to repair streets is classed among those which belong to the corporation, not in its political, but its proprietary character.

So in the case of *Morey v. The Town of Newtane*, 8 Barbour's Supreme Court R., 645, the same rule of law we have been insisting on is recognized. After announcing that the towns in New York, such as the defendant in the case, rested under no absolute and unconditional obligation, either by the common law or statute, to repair roads and bridges, the judge (SELDEN) continues as follows:

"But suppose I am wrong in all this, and the plaintiff's counsel right, in assuming that the law imposes upon towns in this state the same duties which rest upon parishes in England, in respect to the repair of highways; the next question is whether a private action will lie against them for damages or whether the only remedy is by indictment. The doctrine is now well settled that a municipal corporation, or any other corporate body enjoying franchises and privileges for its own convenience or benefit, is liable in a civil action for any injury resulting either from its misfeasance or that of its officers, or from the neglect of any duty which its charter or the law imposes upon it. A series of decisions, commencing with the *Mayor of Lynn v. Turner*, 1 Cowper, 86, and continuing with some fluctuations down to the present time, in the courts of England as well as of this and other states, have established this principle. But the question here is, whether this rule is equally applicable to those minor political organizations or *quasi* corporations whose corporate powers and functions are conferred without their solicitation, for the benefit, not of themselves, but of the public at large." The judge then quotes the case of *Russell v. The Men of Devon*, and the Massachusetts cases, as exempting *quasi* corporations from the supposed liability. It will be observed here, that while this distinction is taken, municipal corporations are classed with those whose powers, as a general thing, are conferred not with reference to the general interests of the whole state, but for the convenience and advantage of the citizens who are incorporated, and are considered liable for the neglect to discharge such corporate duties in a private civil action.

"In the case of *Martin v. The Mayor, etc., of Brooklyn*, 1 Hill, 545, the responsibility of incorporated cities, for neglect to perform corporate duties, where the duty is absolute and due from the corporation, as such, and where the neglect results in private damage, is expressly admitted, and the nonrepair of streets is mentioned as illustrating the principle.

"In *Wilson v. The Mayor, etc., of New York*, 1 Dana, 595, the distinction is taken between duties which are discretionary, and those which are absolute and imperative. For the exercise of their discretion, when discretion is given, neither corporations nor individuals can be made civilly liable. It is the necessary immunity of all public officers, acting in some sense in a judicial capacity. But for misfeasance or nonfeasance, 133 in respect to a duty absolutely imposed and merely ministerial, corporations are liable in the same way as individuals; so that, while a municipal corporation, having power to construct sewers and drains, cannot be sued for the manner in which they have exercised their discretion, yet having decided to construct a particular sewer, they are responsible for the manner in which the work is executed and maintained.

"The same distinction is taken and enforced in the case of the *Rochester White Lead Company v. The City of Rochester*, 3 Comstock's R., 464."

If we turn now to the decisions of our own supreme court, we shall find that they have gone far beyond anything claimed in this case. In *Rhodes v. Cleveland*, 10 Ohio, 160, and *McCombs v. The Town Council of Akron*, 15 Ohio, 480, municipal corporations, in the exercise of their admitted authority, without malice or negligence, are held liable for injuries resulting to private individuals. And Judge BIRCHARD, dissenting in the latter case, concedes the liability of municipal corporations, in all cases in which an individual could be held liable, but is unwilling to go further. 134

The result of all these authorities, it seems to me, is this, at least: That a municipal corporation is liable to actions for injuries to individuals occasioned by its neglect or omission in performing a corporate duty imposed upon it by law, which is ministerial, and not discretionary in its nature, and that although no right of action is expressly given.

The demurrer will, therefore, be overruled.

S. M. Hart, and *Ketchum & Headington*, for Plaintiff.

E. A. Ferguson, for City.

CORPORATIONS—BONDS.

[In the District Court of Ohio, Second Circuit, Erie County, September Term, 1852.]

Before Mr. Justice Bartley, Presiding, and Messrs. Justices Humphreyville and Starkweather.

[CURTIS V. HUTCHINSON AND OTHERS.

Foreign corporations—Capacity to sue—Negotiability of bonds—Rights of assignee—Lex loci.

This was a bill in chancery to foreclose a mortgage. The cause was argued in the district court of Cuyahoga county, and reserved for decision in the county of Erie.

Hutchinson, Bingham & Company, of Cleveland, being largely indebted to the bank of Cleveland and others, in 1839, made arrangements to obtain a loan from "The Tenth Ward Bank," in the city of New York, a fraudulent company, organized under the general banking law of New York, which failed before it was put into full operation. With a view to this arrangement, H., B. & Co., in April, 1839, executed a bond for \$35,000, secured by a mortgage on real estate in Ohio, to Isaac H. Mead, in trust for the Tenth Ward Bank, Mead being at the time the president. This bond and mortgage was, in May, 1839, delivered to the Tenth Ward Bank in New York, and certificates of stock in the bank to the same amount taken in exchange for it. At the same time, a memorandum of an agreement was given by the bank, to the effect that as soon as the bank should be able to commence business, it would discount notes of Hutchinson, Bingham & Company to the amount of \$20,000, taking as security therefor the hypothecation of the certificates of stock in the bank, to the amount of \$25,000. In July, 1839, this bond and mortgage was transferred by the Tenth Ward Bank to Beers, in the purchase of Alabama state stock to the amount of \$25,000, by the hypothecation of 135

which with the comptroller, the bank obtained notes for circulation. Beers, claiming to be a *bona fide* assignee of the bond and mortgage, before maturity, afterward, for a valuable consideration, transferred the same to Curtis, the complainant. The loan to Hutchinson, Bingham & Company was to be in the notes of the Tenth Ward Bank, which were to be put in circulation in Ohio and Michigan in the purchase of wheat. In August, 1839, a person of the name of Schuyler, claiming to act as the agent of Hutchinson, Bingham & Company, in New York, in procuring the loan, became a director in the said bank, and about the same time obtained a discount of two of the notes of Hutchinson, Bingham & Company, for \$5,000 each, pledging to the bank \$12,500 of the certificates of stock, but on the notes discounted took \$2,500 in the stock of the bank, and for the balance, being \$7,500 less the discount, took the notes of the Tenth Ward Bank, and placed the same in the hands of a person of the name of Ketchum, on a pledge that he would go to the state of Michigan and purchase wheat therewith. But Ketchum, in violation of his agreement, paid the same to a house in Wall street in satisfaction of a debt of his own, and the paper immediately coming back on the Tenth Ward Bank for redemption, broke the bank; and no further discounts were ever made, and not one dollar of the money of the bank was ever actually received by Hutchinson, Bingham & Company. The indebtedness of Hutchinson, Bingham & Company to the bank of Cleveland, was secured by a subsequent mortgage on the same property, and that bank also having failed, and its assets being disposed of, Zalmon Fitch, its late president, became the assignee of the mortgage and claims to hold the mortgage premises thereby.

Mr. Justice BARTLEY, in delivering the opinion of the court, held,

First—That the Tenth Ward Bank, as a corporation, could exercise no rights or power, except such as it derived through the general banking law of New York, and that under this law the company had no power to take a bond secured by a mortgage on real estate out of the state of New York, either directly to itself or through the intervention of a trustee, as a basis for its banking operations, or for any other object
136 contemplated in the execution of this bond and mortgage.*

Second—The testimony shows the bond and mortgage to have been procured through the false and fraudulent representations of the president of the bank, and therefore could not have been enforced in a court of equity, either by the bank itself or any person for its use. Besides, a bond and mortgage executed in Ohio and delivered to a fraudulent banking company in another state, under an arrangement to obtain its worthless paper and put the same into circulation in Ohio, would be void, as against public policy.

Third—If the company had no legal capacity to take the bond and mortgage, then no interest could have been passed by the assignment. Besides, under the laws of New York, the bond was not negotiable, and the assignee, therefore, took the same, subject to all the equities which could have existed against it in the hands of the bank itself.

Fourth—This bond, executed in Ohio, but delivered and payable in New York, although negotiable by the laws of Ohio, was not negotiable by the laws of New York. The nature, validity and construction of a contract is ordinarily governed by the laws of the place where made;

*See *Bank of Augusta v. Earl*, 13 Peters, 577, 578; *The Bank of Kentucky v. The Schuylkill Bank*, 1 Parson's Select Equity Cases, 225.—[Eds.]

but where a contract is made in one state, and to be performed in another state, or a bond executed in one state is to be paid in another state, the *lex loci* of the latter state must govern it. The *lex fori* governs only the remedy, while the *lex loci* controls as to the validity of a contract. So that a bond or note indorsed or negotiated in one state where it is not made negotiable, and the laws of which govern its nature and validity, will sustain a suit brought upon it in the name of the indorsee in another state, by the laws of which the instrument is made negotiable, yet the defense, touching the nature, validity and construction of the instrument, will be governed by the laws of the former state. So that such indorsee, although taking the instrument before maturity, and without notice, could be exempt from no defense which could be made to a suit on the instrument in the name of the payee.†

Any defense, therefore, which could be made against a suit on this bond and mortgage in the name of the Tenth Ward Bank, would be available against this complainant.

Bill dismissed.

WATER CRAFT.

137

BORDEN V. THE SCHOONER EAGLE.

Services of master—Form of declaration—Construction of 38 Laws, 34; Curwen's Statutes, 596; Swan's Statutes, 209.

This was a writ of error brought to reverse a judgment against the plaintiff, in an action on a promissory note given for the services of the master of the vessel. The statute provides "that steamboats and other water crafts navigating the waters within, or bordering upon this state, shall be liable for debts contracted on account thereof, by the master, owner, steward, consignee, or other agent, for materials, supplies or labor, in the building, furnishing or equipping the same, or due for wharfage."*

Mr. J. H. Magruder, for the Plaintiff.

Mr. L. S. Beecher, for the Defendant.

Mr. Justice BARTLEY, in delivering the opinion of the court, held,

First—That the action could not be sustained, under the statute, for the services of the master of the vessel. †

Second—A declaration in a suit against a boat, under this law, should disclose the fact that the cause of action falls within the provisions of the law.

Judgment affirmed.

†See Story's Conflict of Laws, sec. 565, 281: *General Insurance Company v. Bland*, 1 Western Law Journal, 281; 2 Kent's Commentaries, 454.—[EDS.]

*Swan's Statutes, 209; Curwen's Statutes, 596.

†See *Lewis v. The Cleveland*, 12 Ohio R., 341, where the vessel was held liable for seamen's wages. Under the admiralty law, the master, having no lien for his services, cannot proceed *in rem* against the vessel. *Fisher v. Willing*, 8 Ser. & Rawle, 118; *The Ship Packet*, 3 Mason, 255; *Abbott on Shipping*, 655, note (1).—[EDS. of W. L. J.]

WATER CRAFT.**THE BRIG PARAGON V. SPRAGUE.**

Construction of 38 Laws, 34; Swan's Statutes, 209; Curwen's Statutes, 596; Assignability of claim against the vessel.

This was a writ of error brought to reverse the judgment of the court of common pleas of Erie county, under the Ohio water craft law.

Messrs. Lane, Stone & Lane, for the Plaintiff in Error.

Mr. J. H. Tyler, for the Defendant.

138 Mr. Justice HUMPHREYVILLE, in delivering the opinion of the court, held, that the cause of action which will sustain a suit against a boator vessel under the watercraft law of Ohio*, even if evidenced by a note in its form negotiable, is not transferable so as to enable an assignee to maintain the action *in rem* in his own name.

Judgment affirmed.

EMINENT DOMAIN.

[In the District Court of Ohio, Second Circuit, Cuyahoga County, September Term, 1852.]

Before Mr. Justice Bartley, Presiding, and Messrs. Justices Humphreyville and Starkweather.

HENRY KRAMER V. THE CLEVELAND AND PITTSBURGH RAILROAD COMPANY.

[Reported by G. WILLEY.]

Constitutional law—Appropriations of private property for railroads—Mode of compensation—Extent of damages.

This was an action on the case for entering upon the plaintiff's land and appropriating it to the purposes of the railroad. Plea, that the premises had been appraised and the damages assessed, and a tender of the amount thereof, deposited with the clerk of the court, pursuant to the provisions of the special act of the legislature of February, 1849, entitled, "an act authorizing the city of Cleveland to subscribe to the capital stock of the Cleveland and Pittsburgh Railroad Company, and for other purposes."

To this plea the plaintiff demurred.

Mr. Justice BARTLEY delivered the opinion of the court, and held that the special law referred to, is unconstitutional and void, upon the following grounds:

First—The constitution in force when this law was passed, provided that "private property ought and shall ever be held inviolate, but always subservient to the public welfare, provided a compensation in

* Swan's Statutes, 209; Curwen's Statutes, 596; 38 Laws, 34.

money be made to the owner."† One of the most sacred and important purposes of government is to protect every person in this rights of private property. The right of "eminent domain" is said to be one of the highest attributes of sovereignty. In the exercise of this right the government may take private property when required for the public welfare; but under our constitution only on condition of paying the owner a compensation in money. This right of "eminent domain" has been, as it seems, conferred upon, or delegated, to some extent, to railroad companies. That this may be done seems not now to be an open question.* But when private property is taken for the public use by a railroad company, it cannot be seized and taken, as it is sometimes, from extreme public necessity, by the government, in the time of great public danger or emergency. The interest or title to private property cannot be taken and passed to a railroad company upon the ground of "the public welfare," without either being done by an agreement with the owner, or by the adjudication of a competent tribunal upon the compensation to be paid. Where the parties cannot agree, it is by the exercise of judicial power, which by the constitution is vested in the judicial tribunals, that the question of the compensation is fixed, and without which the interest or title to the property cannot pass to the company. The legislature cannot pass a law divesting one person of his vested title to the fee in his land and passing it to another person by the mere operation of law. The title can only be passed by an agreement of the parties, or by the operation of a judgment of a court before which both parties can be heard. 139

Now, it appears from this special plea, that this railroad company, in accordance with the terms of this special law, made out a description of the land taken or appropriated, and without furnishing a copy to the owner, made an application to a judge out of court, and, in the absence of the owner, had three appraisers appointed, who, without a hearing of the parties, proceeded and made their appraisal, and returned the same to the clerk of the court. And this return of the appraisers, without having even to pass the approval or judgment of any court, is made final and conclusive, and from it no appeal or other remedy is allowed. Thus, without any adjudication or hearing before any tribunal possessing judicial power, it is claimed that this plaintiff has been divested of the right and interest in his property, and the same passed to the railroad company. This cannot be done without a violation of the right of private property, guaranteed by the constitution; and in this respect, in the opinion of this court, the law is unconstitutional and void. 140

Second—The compensation required by the constitution to be paid to the owner, is a compensation for the loss sustained by him. This loss does not necessarily consist alone in the value of or damage done to the property actually taken and appropriated by the railroad company. The remaining and adjacent land belonging to the owner may be greatly injured and depreciated in value by the appropriation. Now this law provides only for a compensation for the value of or damage done to the property actually taken, leaving the owner without any compensation for the injury done his remaining and adjacent lands, if any, which may have been injured, and even rendered in a manner useless, by the appropria-

† Swan's Statutes, 36; Curwen's Statutes, 55.

* See the authorities collected in Curwen's Statutes, 35.

tion.* In this respect, this law provides for a violation of the constitutional rights of private property, and is therefore void.

Third—The constitution provides that the compensation to the owner shall be made "in money." But this law provides substantially that the loss occasioned to the owner shall be compensated by the prospective benefits conferred on him by the railroad, and the balance, if any, in money. The law makes no distinction between general benefits conferred upon the owner as an individual and local or special benefits to the particular property from which the appropriation is made. As early as the case of *Cooper v. Williams*, 4 Ohio R., 287, the supreme court of this state decided that general prospective benefits conferred upon the owner could not be set off or deducted as a part of the compensation allowed for such injury. In this case, Judge LANE, delivering the opinion of the court, uses the following language: "It becomes important to ascertain the nature of the benefits which ensue from the construction of the canal. They may be classed under the names of general and accidental. The general advantages are the facilities of traveling, accessibility to market, reduction of the price of transportation, and the effect of these in enhancing the value of land. The accidental advantages consist of the peculiar benefit conferred upon specific tracts of land, by the opportunities of basins, warehouses and other commercial advantages; of all benefits of the water consistent with its use for the canal, and for the means of navigation, etc., from waste gates. To attain the general advantages was the precise end for which the canal was constructed. They were designed for all; they belong to all, and may be claimed by all. But the accidental
141 benefits, although often of the highest moment to the individual, are of a nature so indefinite and uncertain, that no vested right exists to exact them from the agents of the state."

This interpretation is clearly founded on sound reason and correct. We do not understand this interpretation to be overruled in the case of *Symond and Others v. Cincinnati*, 14 Ohio R., 147. A different question was settled in that case. A railroad, although constructed by an incorporated company, is claimed to be a public work, and upon this ground the eminent right and privilege is conferred upon the company to take private property and make it subservient to the public welfare. If the railroad be a public work, then its general advantages and benefits are common to all, were designed for, and may be claimed by all.

This was the consideration for which the privilege to take private property was conferred upon the company, and the company could not exercise any such right without it. To set off these general and speculative prospective advantages or benefits common to all the community, and thus reduce the compensation for damages done to the private property of one person, would be to the extent of that deduction a practical confiscation of his property. §

Upon each of these grounds, this law, in the opinion of the court, is in conflict with an express provision of the constitution existing at the time of its enactment, and is therefore unconstitutional and void. This special provision is different from the general law under which railroad

* See also to the same point, the opinion of Mr. Justice MATTHEWS, in *The Little Miami Railroad Company v. Martin*, 10 Western Law Journal, 54.

‡ The cases on both sides of this question are collected in Curwen's Statutes, 36, note.

companies have generally acted. It appears that this company had another and different provision in its charter for procuring its right of way, but this special provision seems to have been subsequently inserted in a bill, and passed under a title not indicating the subject matter of this provision by any means.

The demurrer to the plea sustained.

BILLS OF LADING.

ADAMS v. THE BRIG PILGRIM.

[Reported by G. WILLEY.]

Negotiability of bill of lading—Contradicting its recitals—Evidence of the master.

Mr. Justice BARTLEY, in delivering the opinion of the court, held,
First—That a bill of lading, although a negotiable instrument by the custom of merchants, its indorsement or assignment transfers no more than the property in the goods which it represents, and does not transfer the contract between the original parties to it. Therefore, the assignee of such an instrument cannot maintain an action founded upon it as a contract in his own name.*

Second—That a bill of lading is a mere fiction, and therefore void as a bill of lading, if the property described in it was never shipped by the consignor; and that it is competent for the defendant to prove this fact as a defense to an action against a vessel founded on a bill of lading.†

Third—That the master of a vessel, not interested directly as owner or part owner thereof, is competent as a witness to prove, on the trial of such cause, the nonshipment of the goods described in the bill of lading; also, to prove the bill of lading to be false and fraudulent by the insertion of other goods in it after he had signed it, which were never shipped or delivered on the vessel.

Judgment for defendant.

Messrs. Wilson, Wade & Wade, for Plaintiff.

Messrs. Foot & Newton, for Defendant.

WATER CRAFT.

HOWE v. THE STEAMBOAT EMPIRE.

[Reported by G. WILLEY.]

Construction of 38 Laws, 34; Swan's Statutes, 209; Curwen's Statutes, 596; Services of agent on land.

The statute provides that the vessel shall "be liable for debts contracted on account thereof, by the master, owner, steward, consignee or other agent, for materials, supplies or labor, in the building,

*See *Thompson v. Deming*, 14 Meeson & Welsby, 403; 4 Denio's R., 330.—[EDS.]

†See *May v. Babcock*, 4 Ohio R., 348; *Barrett v. Rogers*, 7 Massachusetts R., 297; 1 Greenleaf's Evidence, sec., 305.—[EDS.]

repairing, furnishing or equipping the same, or due for wharfage ; and also for damages arising out of any contract for the transportation of goods," etc.†

This suit was brought to recover \$500, agreed by the captain of said boat to be paid to plaintiff for acting as the local agent of the boat, stationed at Buffalo in 1850. The evidence showed that plaintiff was occasionally
143 on the boat during her trips, but it did not appear that he performed any service on the boat, except as her general agent on land.

Mr. Justice STARKWEATHER, in delivering the opinion of the court, held that the act does not authorize proceedings against the boat for services rendered by an agent on the land, although the services were connected with the business of the water craft upon the water.

That the supreme court of Ohio, in the adjudged cases, arising under this act, by applying its provisions to the cases of supplies to be consumed on board,§ and to the wages of seamen and others employed on water craft,|| had given to this act a very liberal, if not a latitudinous construction, and that this court was not disposed to extend it further.

The case of *Drew v. Steamboat Patchin*, was distinguished from this: the services, as agent, in that case, having been performed chiefly on board, Drew accompanying the Patchin on her trips as one of her complement of men.

Judgment for defendant.

Messrs. S. B. & J. Prentiss, for Plaintiff.

Messrs. Willey & Carey, for Defendant.

146

ACCOUNT—EVIDENCE—STATUTES.

[In the District Court of Ohio, Fifth Circuit, Hamilton County, September Term, 1852.]

Before Mr. Chief Justice Caldwell, Presiding, and Messrs. Justices Carter, Matthews and Piatt:

RICHARDSON & COMPANY v. WINGATE, SURVIVING PARTNER OF WINGATE & SNYDER.

Book account—Evidence to explain book—Construction of Chase's Statutes, 1295 ; 29 Laws, 122 ; Swan's Statutes, 326 ; Curwen's Statutes, Supplement, chapter 583, section 2.

This was an action of assumpsit, brought by Wingate, as surviving partner, and C. W. Snyder, against the defendants below, A. G. Richardson & Co., for the balance of an account. The defendants offered to prove by one of their firm, a party to the record, a set-off, consisting of the items of a book account on the books of the firm, purporting to be an account against C. W. Snyder, alone; though it appeared on the face of it to have been charged at one time against Wingate & Snyder. The witness was asked to explain the erasure of the names of Wingate &

†Swan's Statutes, 209 ; Curwen's Statutes, 596 ; 38 Laws, 34.

§*The Huron v. Simmons*, 11 Ohio R., 458.

||*Lewis v. The Cleveland*, 12 Ohio R., 341.

Snyder, and the substitution of that of C. W. Snyder as the other party to the account. This was objected to and the objection sustained, and the refusal of the court to admit this testimony is the error relied on to sustain the present writ.

Messrs. Smith, Corwine & Holt, and Coffin & Mitchell, for Plaintiffs in Error.

Messrs. Fox, French & Pendleton, for Defendants in Error.

Mr. Justice MATTHEWS delivered the opinion of the court.

The statute authorizes a party to an action to be examined, touching the validity of his book account.* This presupposes the existence of a book account. If there is no book account, the party cannot be examined on his own behalf. An account once kept, and afterward lost or destroyed, cannot be received by the oath of the party. Now what is a book account? In the first place, it must be kept in a book. A talley, or a board, or a slate, or loose sheets of paper, is not a book account. Also, it must be an account—that is, a formal statement in detail of the transactions between two named parties, made contemporaneously with the transactions themselves. A list of charges and credits, without showing on its face against whom and in whose favor they are made, is not a book account—and the definition fails if the entries are not original—made at the time the transactions took place, or immediately after. It is this thing—this book account, which our law allows to be substantiated by the oath of the party who kept it. The account is as material and important part of the testimony as the evidence of the party verifying. The account itself must contain upon its face everything necessary to charge the party who kept it, by his own oath, to supply the proof that it is in truth and in fact what it purports to be. It is for the express purpose of supporting the statements of the account that the party is allowed to be called. 146

The policy of the law, from the necessity of the case, allows the statements of a party, made under the circumstances which constitute them a book account, to be given in evidence. It is left to the party to prove by his own oath, only, the circumstances under which the statements, as they appear upon the book, were made. If they are such as to constitute the account as offered, a book account, then he must recover according to the terms of the account, or not at all. The ground of the admission of this evidence is the necessity of the case, and its credibility is based upon the supposition that statements made, although by the party himself, at a time when he was under no special temptation to falsify, will be true. Hence, the charges must be contemporaneous with the transactions which they describe. This principle, of course, rigidly and properly excludes statements of a party made at a subsequent time, and forbids any statements of a party, offered as testimony, which add to, explain, or take away anything from the face of the ac- 147

*In all actions wherein any claim or defense is founded on book accounts of not more than eighteen months' standing, in which is drawn in question the validity or amount of any such book accounts, the court or justice may, upon the trial of such action, examine the party, under oath or affirmation, touching the validity of such account or accounts, which shall be admitted as evidence on the trial; the credibility thereof being left to the jury or justice to determine. Chase, 1295; Swan 326; Curwen, Supplement, chap. 583, sec. 2. The American cases upon book accounts are collected and ably discussed in a note to *Price v. The Earl of Torrington*, 1 Smith's Leading Cases, *139.—[EDS.]

count. He is allowed to prove the foundation for the introduction of the account. When he has done that, the account may be introduced as evidence, but must speak for itself. If it cannot do that, it is not an account—at least no one can be allowed to speak for it.

In the case before us, the account offered in defense was not an account between the defendants below and the firm of Wingate & Snyder. It was an account against C. W. Snyder. It is true that the account in the original book appeared at one time to have been with Wingate & Snyder, and their names erased. But when that erasure took place, whether before any entries were made or after, cannot be inferred from the face of the paper. For all that appears, the account might always, from the beginning, since it was an account, have stood against Snyder alone. At any rate, when offered, it was not an account against the plaintiff, but against an entirely different person. One of the defendants was called to prove that the account was wrongly charged against that person, and ought to be against the plaintiffs. He was called to prove, not that his account was just and true, and valid, as stated, but that it was just the reverse, and asking the additional privilege, on the trial, of correcting it, to make it fit the case, and to recover upon it as corrected. This certainly is in direct opposition to the letter of the law, which allows a party to verify, not contradict, his book account, and as completely violates its spirit.

We think the court below committed no error upon this point; and as this settles the whole controversy, the judgment below will be affirmed.

Judgment affirmed.

155

SURETIES—MORTGAGES.

[In the District Court of Ohio, First District, Hamilton County, November, Term, 1852.]

Before Mr. Chief Justice Caldwell, and Messrs. Justices Carter, Matthews and Woodruff.

CHARLOTTE UPJOHN v. JOHN EWING AND AUGUSTA EWING, HIS WIFE, AND OTHERS.

Release of security by joint obligees—Rule in equity—Mortgages.

It is a well settled rule of law, that one or more of several joint obligees or covenantees may release a joint debt or obligation, or may do anything to effect a settlement or arrangement of the claim. A release executed by five of six co-mortgagees of the mortgage debt, was therefore held, in this case, to be a dis-
 156 charge of the mortgage, and a bill brought by the sixth mortgagee to subject the mortgaged premises to the payment of one-sixth of the mortgage debt, was dismissed.

This was a bill in chancery, which came into this court on appeal from the commercial court. The facts are stated in the opinion of the court.

Mr. T. J. Strait, for complainant, claimed a decree of foreclosure for one-sixth of the mortgage debts, and an order for sale of the mortgaged premises.

Mr. F. Ball, for defendants, resisting, made the following points:

First—The decree of the supreme court, being between the same parties and in relation to the same subject matter, is a bar to this suit. 2 Story's Equity, page 705, section 1523.

Second—Where five out of six joint creditors or mortgagees unite in a release to their debtor, the sixth is barred, and the release is conclusive upon all. 1. As to partners the rule is familiar. Story on Partnership, sections 115 and 252. 2. It also applies to joint creditors not partners, and to trustees. *Austin v. Hall*, 13 Johnson's R., 286; *Decker v. Livingston*, 15 Johnson's R., 479; *Hoffman v. Dunlap*, 1 Barbour's S. C. R., 185; *Wallace et al. v. Kelsall*, 7 Meeson & Welsby R., 264; *Husband v. Davis*, 4 English Law and Equity R., 342; 2 Burrow, 978; *Joy et al. v. Wurtz et al.*, 2 Washington's C. C. R., 268.

Third—The debt, if any, is due from Bonsall's estate to the six mortgagees jointly, and a bill by one of the joint mortgagees to foreclose one-sixth of the mortgage debt, cannot be maintained. *Lowe v. Morgan*, 1 Brown's Chancery R., 369.

Mr. Justice WOODRUFF delivered the opinion of the court.

This suit is brought to foreclose one-sixth of two mortgage debts, being the interest of the complainant therein.

Joseph Bonsall executed two mortgages to the complainant and her co-mortgagees, being six sisters; one in October, 1836, for \$6,000, and one in July, 1838, for \$3,750, both on the same premises, situated on Fourth street, west of Western Row, in Cincinnati. In November, 1839, Bonsall sold and conveyed thirty feet by one hundred of said premises to John Brewster, with the understanding that his lot should be released from the mortgage liens; and Brewster refused to pay the whole purchase money to Bonsall until he produced a release of said liens so far as the thirty feet were concerned. A release was obtained on the 2d of June, 1841, from all the mortgagees, except the complainant; and on the 1st November, 1842, Brewster sold and conveyed said lot to Augusta Kimball, now the wife of said respondent, Ewing. On the 8th July, 1845, the mortgagees, including the complainant, brought an action of ejectment on the mortgages, to obtain possession of the lot sold to Augusta Kimball; and, in 1846, Ewing and wife filed a bill in the supreme court of this county, to establish said release and quiet their title. A decree was obtained to that effect, reserving to the present complainant whatever right she might have in equity, to subject said premises to the satisfaction of the sixth of the balance due on said mortgage debt, or to recover the same against her co-mortgagees; and the present bill is the result of the foregoing litigation. 157

The decision of this case depends upon the construction to be given to the release signed by five of the six mortgagees above mentioned. It will be observed that the object of the release was to obtain payment from Brewster, of the balance of the purchase money due by him, and which Bonsall agreed to pay to the mortgagees. It is a well settled rule of law, that one or more of several joint obligees or covenantees may release a joint debt or obligation, or may do anything concerning the sum to effect a settlement or arrangement of the claim. In this case, the release was given to enable Bonsall to obtain payment of Brewster of the balance due, and apply the same to the mortgage due the complainant and her co-mortgagees; this was an act done for their benefit, and whether or not Bonsall complied with his promise so to apply the money, they having put it in his power to affect the interest of Brewster, neither

he, Brewster, or his grantee, Augusta Kimball, ought to be prejudiced thereby.

If a co-creditor can release the whole of a joint debt, we can see no reason why he may not also release the security, that being a mere incident, as a mortgage is held to be with respect to the debt secured by it.

We can find no authority to the contrary of this general proposition; none is cited by counsel, and there seems to be no reason for any difference between the nature of the security to be released. Joint creditors are also considered, with respect to each other, as cotrustees, and will be liable as such. We, therefore, think that the remedy of this complainant, if she has been prejudiced by their acts, is more properly against them.

Bill dismissed.

(Case reversed in 2 O. S., 13.)

APPEALS.

WHETSTONE, ADMINISTRATOR OF MADDOCK, v. THORP, MEARS, AND OTHERS.

Appeals to district court by administrator—Perfected at the next term—Construction of Curwen's Statutes, chapter 1124, section 6; 50 Laws, 94, section 6—Dismissing appeal.

Although an administrator is not required to give bond to perfect an appeal made by him, it is necessary for him to use due diligence in perfecting his appeal, by causing the transcript and papers to be filed at the next term of the district court after the end of the term of the court below.

This case was docketed as an appeal from the commercial court of Cincinnati, whose decision of it is given on page 303 of the ninth volume of this journal. It came before this court upon the motion by defendants to dismiss the appeal, on the ground that the transcript was not filed in time to give this court jurisdiction.

At the October term, 1851, of the court below, a final decree was rendered, dismissing the complainant's bill, and notice of appeal was duly entered by him. The next term of the district court after the decree, was held in April, 1852; and at the next term after that, the September term, 1852, the transcript and papers were first filed; whereupon the defendants made their motion to dismiss. The motion was continued until this term.

Messrs. Chase & Ball, and Morris, Tilden & Rairden, for the motion.

Messrs. Storer & Gwynne, resisting it.

Mr. Chief Justice CALDWELL delivered the opinion of the court, and held that the statute exempts an administrator from giving bond as required of other parties; in order to perfect his right to an appeal (50 Laws, 94), it is necessary for him to use due diligence in perfecting his appeal, by causing the transcript and papers to be filed at the next term of the district court after the end of the term of the court below, if the period of thirty days shall have elapsed since the end of such term; and that he cannot be permitted to delay perfecting his appeal for an indefi-

nite period, for such a practice would mislead parties, and tend to protract litigation unreasonably. The appellant having suffered the April term of this court to pass by without causing his transcript to be filed, it was too late to file it at the September term, and the appeal will, therefore, be dismissed.

Appeal dismissed.

ARREST FOR DEBT.

159

[Montgomery, Ohio, Common Pleas, November 29, 1852.]

Before Mr. Justice Hart.

THE STATE OF OHIO, ON THE RELATION OF CHARLES B. MOREHOUSE
v. WILLIAM ROBINSON, CONSTABLE.

[*Practice—Capias ad respondendum—Sufficiency of affidavit—Construction of 2 Curwen's Statutes, chapter 432; 41 Laws, 28.*

An affidavit that a debtor is "about to remove out of the state to defraud his creditors" is not sufficient to justify the issuing of a *capias ad respondendum* under the act of February 7, 1843 (2 Curwen's Statutes, chap. 432; 41 Laws, 28), which requires the affidavit to state "that the defendant or debtor is about to remove his person out of the state or county, *with intent thereby* to defraud his creditors."—[EDS. W. L. J.]

Application for a writ of *habeas corpus*. The applicant, Charles B. Morehouse, was arrested on a *capias ad respondendum*, upon the affidavit of William Shaffer, setting forth that the applicant (Morehouse) was "justly indebted to him (affiant) in the sum of thirty-one dollars and eighty-nine cents; and that said Morehouse was about to remove out of the state to defraud his creditors."

Mr. C. L. Vallandigham, moved to discharge the applicant on common bail, and made several points, two only of which it will be important to note.

First—That the affidavit was defective in not disclosing the *facts and circumstances* tending "to establish" that the petitioner was "about to remove his body out of the state, with intent thereby to defraud his creditors." On this point he referred to *Hockspranger v. Ballenburg*, 16 Ohio R., 304, as the judgment of a divided court, and a case frequently and freely questioned by the bar, and maintained that under the stricter rule intended by the new constitution, it ought not to be regarded as a binding authority. He referred to *Messenger v. Lockwood*, 9 Western Law Journal, 521; also, by analogy, to the injunction act of February 25, 1848, Curwen's Statutes, chap. 866; 46 Laws, 96, which requires, even as preliminary to tying up property, that the facts shall be set out; and to the strictness in cases under it, required by our courts. *Putnam's Administrator v. Putnam's Heirs*, 18 Ohio R., 347.

Second—That the affidavit was defective in not pursuing the language of the statute of February 7, 1843,* either literally or substantially—omitting wholly the words, "with intent thereby." He maintained that the court could intend nothing; that the decision in the

* Curwen's Statutes, chap. 432; 41 Laws, 28.

16 Ohio Reports contemplated a literal, certainly a strictly substantial pursuing of the language of the statute; that by analogy to the proof required in actions of slander, the substance of the *words*, and not merely of the *cause*, ought to be demanded; that there was a material difference in the nature of things, between the language of the affidavit, "to defraud," and of the statute, "with intent thereby to defraud;" that the injunction act of February 25, 1845,[†] recognized such a distinction—the language of that act being in a similar case, "with intent or so as to defraud," etc.—the one looking to the *quo animo* of the act, the other to its consequences merely; and that as a case of *fraud* must now be made out, the *corrupt intent* must be averred.

Messrs. Conover & Craighead, contra.

HART, J., overruled the first point, but sustained the second, upon the grounds and reasoning urged.

Whereupon the applicant was discharged on common bail.

RAILROADS—KILLING ANIMALS.

[Morrow, Ohio, Court of Common Pleas, October Term, 1852.]

Before Mr. Justice Stewart.

JOHN G. KENO HACKER V. THE CLEVELAND, COLUMBUS AND CINCINNATI RAILROAD COMPANY.

[*Fences—Locomotive killing animals on the track—Railroads—Liability of.*

A railroad company is not liable to a person who allows his animals to stray upon the track at other places than the regular crossing, for running over them, although the engineer, who might have safely stopped his engine and allowed them to get out of danger, continued to run it at unabated speed.[‡]—[EDS. W. L. J.]

161 THIS was a suit brought to recover damages for hogs of the plaintiff, killed upon the road by the locomotive of the company.

Mr. Kirkwood, for the Plaintiff.

Mr. D. H. Young, for Defendant.

Counsel on part of the plaintiff introduced evidence tending to prove that the track of the road is located through the farm of plaintiff; that on the 17th day of April, 1851, a train of cars belonging to the defendants, and under the control of defendant's servants, passed over that part of the road located upon plaintiff's farm, at their usual speed, and killed six hogs of the plaintiff, being thereon; that though, from the situation of the road, the cars, without injury or damage, might have

[†] Curwen's Statutes, chap. 866; 46 Laws, 96.

[‡] Fences were designed to keep one's own cattle at home, and not to guard against the intrusion of those belonging to other people. See *Tonawanda Railroad Company v. Munger*, 5 Denio, 255; note to *Hess v. Lupton*, 7 Ohio R., 217, Emerson's edition. "Suppose one sells a piece of pasture lying open to another piece of pasture, which the vendor has; vendee is bound to keep his cattle from running into the vendor's piece," Gould, J., in *Tenant v. Goldwin*, 6 Modern, 314, in 1705.—[EDS. W. L. J.]

been stopped in time to allow the escape of the hogs, they were not checked or stopped. The plaintiff then rested.

The defendant adduced no evidence.

The plaintiff's counsel asked the court to charge the jury, that if they were satisfied from the evidence that the servants of the company could, by the exercise of ordinary care and caution, have so stopped and checked the motion of the train of cars as to have permitted the escape of the hogs of the plaintiff without injury or damage, and that they did not check or attempt to check the speed of the train of cars, but continued to run them at their ordinary and unabated speed, by reason of which the hogs were killed, then, and in that case, the plaintiff was entitled to a verdict for the value of the hogs; which instruction the court refused to give, but charged and instructed as follows:

First—That the defendant has a right to have the track of said road free from obstruction, so that the trains may run thereon with safety, subject to be crossed only on public highways and regular private crossings; and, therefore,

Second—That if the jury find from the evidence that the hogs were upon the road, and at other places than the regular crossings when killed, then, although the defendant killed them when proceeding at usual and unabated speed, the plaintiff hath only sustained damage and not injury, and the defendant is not liable therefor.

Verdict for defendant.

CHANCERY PRACTICE.

162

[In the Commercial Court of Cincinnati, November 20, 1852.]

Before Mr. Justice Key.

MOSES F. CRIGLER V. LYLE & PIGMAN AND THE EAGLE INSURANCE COMPANY.

[Reported by T. C. WARE.]

Practice in chancery—Notice of pleadings filed—Cross bill—When subpoena necessary on.

As a general rule no subpoena is required upon a cross-bill, where the party filing it had an interest or right to, or lien upon the subject matter of the litigation. It is otherwise where such lien or interest is acquired by the filing of the bill.

The complainant filed his bill against the defendants, alleging that he had obtained a judgment at law against the defendants, Lyle & Pigman, and that the Eagle Insurance company were indebted to Lyle & Pigman in the sum of \$1,400 and upward, and prayed a decree against the company for the amount of his judgment. Before a decree was entered, Joseph S. Peebles, upon leave of the court, filed his answer and cross-bill against Lyle & Pigman and the Eagle Insurance company, alleging that he was a judgment creditor of Lyle & Pigman, and that the Eagle Insurance company were indebted, etc., and asking a decree against the company for the amount of his debt. No subpoena was issued upon the cross-bill, and no rule against the defendants to answer. Decrees were entered *pro confesso* upon the original and cross-bills, and afterward the

Eagle Insurance company moved the court to set aside the decree as to Peebles as being irregularly entered.

The court held,

First—That as a general rule, the defendants were bound to take notice of the answer and cross-bill equally with other pleadings, under the statute, without a subpoena or rule to answer.

Second—That no subpoena was required, where the defendant, asking to be made a party, and filing his answer and cross-bill, had an interest in, or right to, or lien upon the subject matter of the litigation. It is otherwise where he acquired an interest or lien upon the subject matter by the filing of the bill. In the case at bar, the defendant, Peebles, acquired his lien upon the fund by the filing of the cross-bill.

Motion granted and decree set aside.

163

GUARDIAN AND WARD.

[In the District Court of Ohio, Hocking County, August Term, 1852.]

Before Mr. Justice Thurman, Presiding, and Messrs. Justices Nash and Whitman.

CASE & LEONER V. THE STATE OF OHIO, FOR THE USE OF ELIZABETH, MARY AND REBECCA FUNK.

[Reported by Mr. JUSTICE NASH.]

Guardian's bond—Suits thereon—Liability of guardian.

The late court of common pleas had authority to require a guardian to give a second bond in case the first had become insufficient.

The grant in the constitution, of the jurisdiction to appoint guardians, carried with it all incidental powers necessary to the proper execution of the main power.

The taking of bonds from guardians for the faithful discharge of their trust is an incidental power necessary to a proper execution of the power to appoint.

The statute requiring a bond from guardians before entering upon the duties of their appointment does not impair or restrict the constitutional power of the court to require bonds and security; its only effect is to prevent an appointment from becoming effective unless a bond is first given.

A second bond thus taken will cover money before that time received by the guardian, unless the condition of the bond shows that such was not the intention of the court and parties to it.

A condition that the guardian shall well and truly discharge all and singular the duties of guardian according to law, is broad enough to cover money in the hands of guardian at the time of its execution.

The failure of a guardian to settle his accounts within three years from his appointment is a breach of the condition of his bond.

For a guardian to convert the money of his ward to his own use, is, of itself, no breach of his bond.

A guardian is not authorized to pay his ward's money either to the state, the obligee in the bond, or to his ward, until he attains his majority.

To constitute a refusal to pay a good breach, the declaration should aver a special demand, with time and place, and the words, *though often requested*, will not be sufficient.

A demand, to be valid, must be made by a party entitled to receive, and give a discharge for, the money, and the declaration should so set it forth.

An averment therefore, that the guardian had converted the ward's money to his own use, and refused to pay the same to the said plaintiff or said minors, though often requested so to do, was held to be insufficient, and to show no breach of the bond.

When the declaration contained an assignment of two breaches of a bond, one good and the other bad, and the record showed a general verdict and judgment, the court will not reverse the judgment, but presume the damages assessed on the breach well assigned.

When a person is appointed guardian of several minors at the same time, his appointment is a several appointment for each, and not a joint appointment for all, and a separate bond ought to be given for each ward.

Long usage, has, however, sanctioned a single bond in such cases, and such a bond was held to be a good security for the separate interests of each.

It is error, however, to bring a suit on such a bond for the joint use of all of the wards; their interests being several, the suit must be for the interest of a single ward.

After judgment has been obtained by one, the others may, by *scire facias*, have execution for the several amounts due them.

It seems that when a suit is thus instituted for the use of several, the plaintiff may amend by striking out all the names but one, and proceed in the case to recover the amount due him.

This was a writ of error sued out by the plaintiffs to reverse a judgment of the late court of common pleas in this county. The action was debt on a bond executed by said Case & Leohner with Baker & Cox, now deceased. The declaration and bill of exceptions disclosed the following facts: 164

In 1842 Eli Baker was appointed guardian of said Elizabeth, Rebecca and Mary, minors, by the common pleas of Hocking county, and gave bond with security. At June term, 1845, the said court made an order that said Eli Baker should give additional security; and thereupon he gave the present bond, with said Case, Leohner and Cox, now deceased, as his securities, payable to the state of Ohio, in the penalty of \$100, and conditioned that the said Eli Baker *should well and truly discharge all and singular the duties of guardian, as aforesaid, to the said minors, according to the laws and usages of the state aforesaid.*

After setting out these facts, the declaration set forth two breaches: 1. That \$100 had come to the hands of the said Baker, and *that he had converted it to his own use, and refused to pay the same to the said plaintiff or said minors, though often requested so to do.* 2. That said Baker had not *filed and settled his guardian accounts within three years after his said appointment.*

It also appeared from the bill of exceptions that a part of the money was received by the guardian before the second bond was given, and that the court below had ruled that the obligees were responsible for this sum, as well as for money received by said Baker after the execution of said second bond, being the one now in suit.

Mr. Hunter, for Plaintiffs, insisted,

First—That the bond was void; that it was not a statutory bond, there being no authority in the law enabling the court to take a second bond.

Second—That the breaches are not well assigned, and that the mere allegation that he had converted the money to his use was not sufficient.

Third—There is a misjoinder of persons for whose use the suit is brought, 2 Ohio R., 167.

Mr. Brasee, for Defendant, insisted,

First—That the bond was good under article 3, sec. 5, of the constitution, Statutes 430; *State v. Shaw & Crooks*, 7 Ohio R., 224, 2d part.

Second—Bond good as a common law bond. *Barrett v. Reed*, 2 Ohio R., 409.

166 *Third*—That breaches were well assigned. The conversion of the money to his own use is a violation of his duty, and the statute expressly requires him to settle in three years.

Fourth—That there was no misjoinder.

Mr. Justice NASH delivered the opinion of the court.

The first question presented on this record relates to the validity of the bond on which this suit is brought. It is claimed that the probate court had no authority to require this second bond—the statute only requiring a guardian to give bond before being qualified to enter upon the duties of his trust. Swan's Statutes, 430, sec. 1. The bond now in suit was taken on the order of the probate court, to supply some deficiency in the first bond; and the question is now raised as to the power of the court to make any such order, to require any such additional bond. It is true the statute only declares that a guardian shall, before entering upon the discharge of the duties of his appointment, give bond to the state of Ohio, etc. There is no provision in the statute authorizing the court to require additional security, even in cases where the penalty of, or the securities on the bond are insufficient; and unless the validity of this bond can be maintained under the general grant of power to the probate court, there is a fatal defect in our present legislation on this subject. By section 5, article 3, of the constitution, the courts of common pleas were vested with jurisdiction of all probate and testamentary matters, granting administration, the appointment of guardians, and such other cases as shall be prescribed by law. Swan's Statutes, 29. This section grants exclusive jurisdiction to the common pleas in regard to the appointment of guardians; and as incident to this power, all other powers necessary for the proper execution of this principal power. In the grant of a power is implied every power necessary to carry out and execute the main power. The requiring bonds from guardians is a necessary consequence of a power to appoint them. The statute has restricted this general grant of power, by requiring the giving of a bond before a guardian can enter upon the discharge of the duties of his trust; but makes no provision for the giving of any other bond, whatever unforeseen contingency may imperatively demand it. Since the statute is silent, the court is remitted to its constitutional jurisdiction and powers; and among the incidental ones, we believe this of requiring additional bond and security may be found; nay, is necessarily implied, in order to enable the court duly to exercise the original grant of power. Had the statute made no provision what-
166 ever for the original bond, can there be any doubt of the power of the court to have required it? It would have been a power necessarily implied in the jurisdiction to appoint guardians; and what more necessity for the original bond than for a second one in a proper case? It is true the court, by the statute, has the power of removal *upon good cause shown*. What shall be deemed *good cause* for such removal is nowhere defined in the statute; but it would seem to imply that there must be some misconduct on the part of the guardian to justify such removal. Now the insufficiency of the penalty of, or the security to a bond, can hardly be imputed as misconduct to the guardian, since the one was fixed and the other approved by the court. A guardian ought hardly to be re-

moved, because, from some unforeseen contingency, his bond becomes insufficient, whether as to its penalty or its securities. If he refuses in such a case to give an additional bond, that indeed might be ample cause for his removal. We believe the common pleas, from the grant of jurisdiction in the constitution, had ample authority to take this bond, and all other bonds necessary to secure the faithful discharge of the duties of any guardian, and to secure the money of wards, whose interests are especially intrusted to its care and keeping. Is a guardian to be removed for a matter over which he has no control? Or is the difficulty to be got over by a removal and a reappointment? But the statute requires the appointment of another in the stead of the person removed, which would prohibit the reappointment of the removed guardian. Hence the power to require a second bond is the only remedy for cases where securities become insolvent, or the penalty of the bond proves insufficient to cover the assets which have come to the hands of the guardian. We therefore hold this bond to be valid.

Are these securities liable for the whole sum found to have been received by the guardian? A portion of this money was received before this bond was given, and it is claimed that this sum is not covered by this bond. The object of the bond was to secure this money then in the hands of the guardian, as well as future receipts. The first bond having become unavailable as a security, the second one was taken as a substitute for the first; and the condition of the bond is made broad enough to cover as well money then in the hands of the guardian as money to be received. Nor do we know of any rule of law which requires us to hold otherwise, since the condition itself is broad enough to cover this sum—providing, as it does, that said guardian should well and truly discharge all and singular his duties of guardian, according to law. Now, one of these duties was to pay over all money of his ward which he then had, or might thereafter receive; which duty it is averred that he has failed to do. We would not hold such second bond to cover prior receipts, when it was not clear from the condition and object of the bond that such was the intention of the parties to it. And in so holding we do not consider that we are running counter to the authorities. *Vide* 1 M'Lean, 493; *Myers v. United States*. 167

The next objection urged is that there are no sufficient breaches assigned in the declaration. The second breach assigned is the failure to settle his accounts within three years from his appointment. The statute requires the guardian to settle within that time, and a failure to do it is clearly a breach of the condition of his bond. In *Potter v. Titcomb*, 1 Fairfield, 53; 10 Maine R., 53, a failure by an administrator to return an inventory within the time required by law, was held a breach of his bond; 17 Maine R., 222, S. P. What damages shall be recovered under this breach is a question we are not now called upon to decide.

The other breach assigned is fatally defective in several particulars. In the first place, the use of the ward's money by a guardian cannot be claimed to constitute a breach of his bond. The bond is given to secure the money in his hands; and while he may loan his ward's money, we know of no law which converts a failure so to do into a breach of duty, and of course into a breach of his bond. If he fail to loan the money, and uses it himself, he must account for it without regard to consequences; whereas, if he loans it to others, and acts with due care and caution, he is not responsible for the loss of it by the insolvency of the borrower. So he has the money ready to be paid over, when by law it is

legally demanded of him, he discharges his duty in the trust, and no one has a right to complain.

In the next place, there is no sufficient demand averred. The words, *though often requested*, have always been held insufficient, when it was necessary to aver a special demand. Such a demand must be averred, with time and place. 21 Pick. R., 318; *Broker v. Fuller*, 1 Metcalf R., 180; *Dyer v. Rich*, 3 Harr. R., 21; *The Mayor v. Davis*. In this case there can be no breach of the bond until a demand made and a refusal to pay. The averment of the demand should also show that the demand was made by the person entitled to receive the money. In this case the declaration does not show by whom the demand was made, and is, therefore, defective in both these particulars.

168 There is still another fatal objection to the assignment of this breach. It is averred that the guardian refused to pay the money to the said plaintiff, or to said minors. Now the plaintiff is the state; and she has no right to receive the money, and a payment to her, or any of her officials, would be no discharge of the guardian. Nor were these wards during their minority entitled to receive this money. A payment to his ward by a guardian would be no discharge, unless ratified by the ward after attaining his majority. It needs no authority to sustain so plain a principle. To refuse therefore, to pay either to the plaintiff or to the wards is no breach of his bond. In order to constitute a good averment of such a breach, the declaration should aver a demand, with time and place, made by the person entitled to receive the money, and a refusal to pay on such demand to the person thus entitled to receive and receipt for it. Nothing less than such a refusal to pay can work a breach of his bond. But in this case, as there is one breach well assigned, the court will presume the damages were assessed on the good, and not on the bad assignment.

The next objection, however, we all think is fatal. The suit is brought for the use of these three wards, and it is claimed that their interests are several, and hence that a suit on their joint behalf cannot be maintained. That their interests are separate we have no doubt. The guardian was the several guardian of each, and not the joint guardian of all. The money he received, when received, was the separate money of each. It is true that, in accordance with a very general practice, a single bond was taken in the penalty of one hundred dollars, for the faithful discharge of his duties as guardian of each and all of these minors. This was clearly improper; a separate bond should have been taken in each case; but this practice has prevailed too long and generally for this court now to hold it so erroneous as to invalidate the bond. The bond must be held to be a security; to what extent we are not now called upon to decide, since in this case the penalty is sufficient to cover all the money in the hands of this guardian.

The interests of these wards being several, no suit for their joint benefit can be sustained on this bond. Such we consider the meaning of our statute authorizing suits on official bonds, the decision of our supreme court substantially in *Waldsmith v. Waldsmith*, 2 Ohio R., 156, and the uniform practice in this state. The suit on the bond must be for the several interest of the person for whose use it is prosecuted; or, if prosecuted for more than one, then their interest must
169 be a joint, and not a several interest. Such, too, seems to be the decision in Kentucky under a similar statute, *Montgomery v. Huston*,

1 Monroe R., 197. The other wards must proceed by *scire facias* on this judgment to recover the amounts due them.

This judgment will, therefore, be reversed for this cause, and the case remanded to the court of common pleas for further proceedings. As now advised, we can see no objection to that court's permitting the plaintiff to amend by striking out two of these names, and allowing the case to proceed to recover for the interest of one of these parties. Our present statute of amendments would seem to be broad enough to reach this case, since the amendment does not change the real plaintiff, but only the number of those for whose use the suit is prosecuted. We do not, however, express any opinion at this time by which we shall consider ourselves to be bound, should the parties hereafter see fit to present the question in a proper shape.

Judgment reversed and case remanded.

COMMON CARRIERS.

[In the Superior Court of Cleveland, November, 1852.]

Before Mr. Justice Andrews.

HUGH MCFADDEN v. STEAMBOAT NIAGARA.

[Reported by G. WILLEY.]

Liability of common carriers—Lost trunk—Baggage—Money in trunks.

Carriers of passengers are not liable for money (not being part of the necessary traveling expenses), which is contained in the trunks of travelers, and is lost by their servants.

A gratuity paid to a menial servant of the carrier, to take charge of a trunk, does not impose the duty of extraordinary care upon the carrier.—[EDS. W. L. J.]

Hugh McFadden brought suit against the steamboat Niagara for the loss of a trunk. On the trial before the jury, McFadden proved that on the 1st of May last he embarked on the Niagara, with his family, at Detroit, taking passage, and paying fare, for Cleveland. He had three trunks. One of them contained wearing apparel, together with \$2,500 in gold coin. This trunk he claimed, from the evidence, to have delivered to the porter of the Niagara, stating that its contents were valuable, that he wanted it taken in special charge, and paying the porter a quarter of a dollar for that purpose, and that this trunk was lost. On the point of whether any such trunk was ever delivered there was much conflicting testimony. The main question was whether the plaintiff could recover for the gold in the trunk. 170

Messrs. Herrick, Cross, Hoyt and Prentiss, for plaintiff, insisted that the plaintiff was entitled to recover as well for the money as for the wearing apparel and other contents of the trunk; that boats were accustomed to carry money for hire, and that the notifying of the porter that the contents of the trunk were valuable, and the paying of a special price for extra care, imposed a liability upon the boat for any loss, and cited Swift's Digest, 89; Angel on Common Carriers, 58; *Riley v. Horne*, 5 Bingham, 217.

Messrs. Willey & Cary, and *E. Wade*, for the Niagara, argued that the money in the trunk was not recoverable by the plaintiff against the boat, and cited the decisions of the supreme court of the state of New York, in *Orange County Bank v. Brown*, 9 Wendell, 458; *Pardee v. Drew*, 25 Wendell, 459; *Hawkins v. Hoffman*, 6 Hill, 586; 5 Cushing's Massachusetts R., 69, and Story on Bailments. Also 10 Ohio R., 145, and *The Mad River and Lake Erie Railroad v. Fulton*, 20 Ohio R., 318, in which the decisions in New York are referred to approvingly.

ANDREWS, J., held in pursuance of the New York and Massachusetts modern authorities, that money contained in an ordinary traveling trunk, and taken along by the passenger as baggage, was not recoverable in case of loss, any further than as designed for traveling expenses; that in order to create such liabilities on the part of a boat or transportation company, the unusual contents of such trunk should be made known to the carrier, so that freight, if demanded, might be received in proportion to the risk; that where a trunk with such contents was received, not as mere baggage, but as freight, the carrier would be liable, although he had no notice of the particular contents of the trunk; but that a mere gratuity paid by a passenger to the porter, as a perquisite for taking care of a trunk, did not in the absence of any further proof, vary the liability of the carrier.

The court further held, that if it appeared from the evidence that this money was being transported for purposes of future investment, and no
171 part of it was intended to be used as traveling expenses, that, under the circumstances, the boat would not be liable for any portion of the money.

The jury, under the charge of the court, returned a verdict for \$309, the value of the wearing apparel, disallowing the \$2,500, claimed for loss of money in the trunk.

WRITS OF ERROR.

[In the District Court of Ohio, Second Circuit, Cuyahoga County, September Term, 1852.]

Present, Mr. Justice Bartley, Presiding, and Messrs. Justices Starkweather, Otis and Humphreyville.

AARON BLISS V. ARISTARCHUS CHAMPION.*

[Reported by ROLAND D. NOBLE.]

Writ of error—Allowance of—Construction of Curwen's Statutes, chapter 1115, section 4. 18; 50 Laws, 67; Curwen's Statutes, chapter 588, section 6; 48 Laws, 80.

By the act of February 19, 1852, Curwen's Statutes, chapter 1115; 50 Laws, 67, "either of the judges of the supreme court, in vacation, shall, *on good cause shown*, have power to grant writs of *error*, *supersedeas*, and *certiorari*, and also to grant writs of *habeas corpus*; and the writs of *error*, or *certiorari*, directed to the court of common pleas, may, in the discretion of the supreme court, or judge allowing the same, be made returnable to the district court of the proper county, or to the supreme court." By the 13th section of the same act, "the district court, in addition to the original jurisdiction conferred upon it by article 9, section 6, of the constitution, shall have power, *on good cause shown*,

*See *Bates v. Lewis*, 10 Western Law Journal, 78, to the contrary.

to issue writs of *error, certiorari*," etc. These provisions operate to repeal so much of the 6th section of the act of March 12, 1845, Curwen's Statutes, chapter 586; 43 Laws, 80, as allows a writ of error to issue "as a matter of course."—[EDS. W. L. J.]

The case came before the district court upon a writ of error, issued "as a matter of course," under 43 Laws, 80.

Messrs. Willson, Wade & Wade, for Plaintiff in Error.

Messrs. H. C. Kingsley and R. Wood, for Defendant in Error.

The defendant moved to strike the cause from the docket for want of jurisdiction.

The court sustained the motion, and the cause was stricken from the docket for the reason that the writ of error was issued subsequent to the passage of "an act relating to the organization of courts of justice, and their powers and duties," passed February 19, 1852, 50 Laws, 67, without the writ being issued or granted pursuant to this act, under either section 4 or section 13. 172

NOTE BY THE EDITORS.

We may add, upon the authority of Mr. Justice THURMAN, that in the third circuit all the judges, except Mr. Justice NASH, have uniformly held, that no writ of error can issue under the existing law, except upon allowance and "good cause shown," and that Mr. Justice RANNEY has repeatedly ruled the same way. The argument by which this proposition is supported is this:

By article 4, section 6, of the constitution, the district court has original jurisdiction in four classes of cases: *quo warranto*, *mandamus*, *habeas corpus*, and *procedendo*; and can have such appellate jurisdiction as may be provided by law. The original jurisdiction being thus limited by the constitution, the legislature cannot enlarge it. *Marbury v. Madison*, 1 Cranch, 137. And the appellate jurisdiction cannot be exercised, except in the form and only in the cases prescribed by law. *Wiscart v. Dauchy*, 3 Dallas, 321.

The 12th section of the schedule to the constitution, Curwen's Statutes, page 82, provides "that the district courts shall, in their respective counties, be the successors of the present [late] supreme court; and all suits, prosecutions, judgments, records and proceedings, pending and remaining in said supreme court, in the several counties of any district, shall be transferred to the respective district courts of such counties, and be proceeded in, as though no change had been made in said supreme court." The words of this section are liable to two interpretations: *first*, that they contemplate a transfer of like jurisdiction, as the supreme court had to the district court; and, *second*, that they provide merely for a transfer of the then pending business. That the former was not intended, is manifest from the specific enumeration of cases in which the district court shall have jurisdiction in the fourth article. It cannot, at least, be claimed that this 12th section of the schedule was intended to be a permanent provision. But waiving that question, it was clearly competent to the legislature, under the first section of the schedule, to amend or repeal any laws conferring powers on the old supreme court, at their discretion. And this narrows the inquiry to the question whether they have done so. Those who claim that they have not, refer to the 18th section of the act of February 19, 1852, 50 Laws, 71; Curwen's

173 Statutes, chapter 1115, section 18. But they overlook the fact that that section has been repealed, 50 Laws, 102, section 1; Curwen's Statutes, chapter 1133, section 1. The fourth and thirteenth sections of the act of February 19, 1852 (which, as already stated, it was clearly competent to the legislature to enact), prescribe the manner in which the appellate power of the district court shall be exercised, and the cases to which it shall extend. They declared that the district court, or any judge of the supreme court, in vacation, "shall have power *on good cause shown*, to issue writs of error." This is totally inconsistent with the idea that the writ shall issue "as a matter of course," and if there was nothing further, it would be decisive. The ambiguity which might possibly arise from comparing the language of sections 4, 13 and 18 of the act of February 19, 1852, 50 Laws, 71, does not arise in the first section of the act of April 30, 1852, 50 Laws, 102; Curwen's Statutes, chapter 1133; for that provides that all process and remedies authorized by the laws of this state when the present constitution took effect, may be had and restored to, and "govern the practice of, and impose like duties upon the district courts and courts of common pleas, and the judges thereof respectively, created by the present constitution, so far as such process, remedies and laws shall be applicable to said courts respectively, and to the judges thereof, and not *inconsistent with the laws passed since the present constitution took effect*." The act then proceeds to repeal the eighteenth section before alluded to. The issuing of a writ of error must, therefore, be governed by the fourth and thirteenth sections of the act of February 19, 1852, 50 Laws, 67, 69; Curwen's Statutes, chapter 1115, and therefore only upon allowance and "good cause shown."

193

BOND FOR SECURITY FOR RENT.

[In the District Court of Ohio, Hamilton County, November Term, 1852.]

Before Mr. Chief Justice Caldwell, and Messrs. Justices Carter, Matthews and Woodruff.

BRACHMAN V. WARDEN AND OTHERS.

[Reported by MR. JUSTICE MATTHEWS.]

Covenant—Conditions in a deed—Suits thereon.

The action of covenant may be maintained upon the condition of a penal bond whenever that condition constitutes or contains what imports an agreement. If it is matter of mere condition and defeasance, and contains nothing amounting to a promise, the action will not lie.

Words of recital may be the foundation of an action of covenant. The passage in Platt on Covenants, 15, 16, approved and followed.

The case of *Huddle v. Worthington*, 1 Ohio R., 423, remarked upon.—[EDS. W. L. J.]

Mr. Justice MATTHEWS delivered the opinion of the court.

This is a writ of error to the commercial court of Cincinnati. The action was covenant upon a bond, in the penal sum of \$1,000, with this condition:

"The condition of this obligation is such, that whereas the parties of the second part have this day leased to Anthony Bender certain prem-

ises in the city of Cincinnati, on the south side of Sixth street, between Walnut and Vine streets, on terms specified in the lease of even date herewith, given by said parties of the second part to said Bender, on the agreement of the undersigned to become surety for the rent thereof. Now, if the said Bender, or the undersigned for him, shall faithfully pay the installments of said rent as the same fall due respectively, this obligation to be void, otherwise to be in full force and virtue in law." 194

The declaration recites the lease to Bender, his entry under it, and the execution by the defendant of his bond, profert of which is made, and the contents of which are substantially set out. The averment then follows, that the defendant did thereby covenant and agree to and with the plaintiff, that he would pay the installments of said rent as the same became due respectively. The declaration then alleges a breach in the nonpayment of rent.

To this declaration there was a general demurrer, which was overruled.

The defendant then pleaded *non infregit conventionem*, with notice that he would prove on the trial a surrender of the lease by Bender, and the consequent discharge of him and the defendant from their liability. A bill of exceptions states the evidence upon this issue, which was found for the plaintiffs. After a careful scrutiny of the testimony, we are satisfied that the claim made under this issue on behalf of the defendant was clearly disproven.

The question still remains whether the demurrer to the declaration ought not to have been sustained—whether the action of covenant lies upon the objection set forth.

The action of covenant lies for the recovery of damages for the breach of any agreement under seal. The agreement may be either express or implied. No particular form of words are necessary to make a covenant. Any words will be sufficient which *purport* an agreement.

The action will lie upon the obligatory part of a penal bond, when it contains an agreement to pay the penalty.

It is plain, also, that the action may be maintained upon the condition of a bond, provided that condition contains an agreement between the parties. A covenant may very easily be inserted in the condition, and in such case there can be no objection to the action, which would not lie as well to an action upon a covenant contained in any other instrument.

Whether the condition of a bond, in contemplation of law, implies an agreement that it shall be performed, and will therefore, of itself, sustain an action of covenant, is another question, and has several times been mooted.

The question arose in the case of *Ward v. Johnston*, 1 Munford's R., 45, which was argued by Mr. Wickham and Mr. Wirt, and decided by Judge TUCKER. It was an action of covenant upon a bond with penalty, and a condition, reciting an agreement to sell a tract of land, to be void if vendor, who was one of the obligors, and the other obligor, "his security," should make to the purchaser a deed. It was argued that covenant would not lie, because the condition contained no express stipulation to perform any act. The reply was that an implied stipulation was sufficient. It was held that the action was well brought, 195

because the condition *imported* that something was to be done both by the seller and the security.

The action was maintained upon a similar bond in the case of *Kennedy v. Kennedy*, 2 Bibb R., 464. And in *Dougherty v. Lewellen* and *Stewart*, 3 Bibb, 364, the action was supported on the condition of an injunction bond.

These authorities were before the supreme court of this state in the case of *Huddle v. Worthington*, 1 Ohio R., 423, which was covenant upon the condition of a penal bond to convey lands. It is impossible, however, to ascertain from the report, on what ground the court proceeded in deciding that the action would not lie. The only reason alleged is, that the declaration was upon the condition of the bond alone, without any recital of the obligatory part. The syllabus of the case is, "Declaration in covenant founded on the condition of a bond containing no express agreement, is bad," and this was really the proposition argued by the counsel. The court, in its opinion, approvingly refers to the case in *Munford*, and say that if the declaration had been upon the entire bond as in that case, it might have been different.

In the case of the *United States v. Brown*, Paine's C. C. R., 422, it was held by Judge THOMPSON, that covenant would not lie upon the condition of the official bond of a deputy quartermaster general. The principle of the decision is, that the action will not lie upon a condition, unless it contain words importing an agreement.

The same principle was affirmed in the case of *The State, etc., v. Woodward*, 8 Missouri R., 353, which was an action on a sheriff's official bond, in which it was held that covenant would not lie. The court, in concluding, say, "It is understood that this opinion is only intended to maintain that an action of covenant will not lie on a penal bond, conditioned to be defeated by the performance of collateral conditions, and the word 'condition' is used as contradistinguished from covenant."

In *Hill v. Rushing & Wood*, 4 Alabama R., 212, covenant was maintained upon an attachment bond, conditioned to prosecute a certain suit to effect, and to pay all such costs and damages as the defendant in attachment should sustain by its being wrongfully sued out. The **196** court however held, that damages cannot be recovered beyond the amount of the penalty.

The result of these authorities, in our opinion is, that the action of covenant may be maintained upon the condition of a penal bond, whenever that condition constitutes or contains what imports an agreement. If it is matter of mere condition and defeasance, and contain nothing amounting to a promise, the action will not lie.

The question then remains, does the condition of the bond now sued upon, contain an agreement on the part of Brachman to pay the rent reserved in the lease to Bender, upon the default of the latter. There is an express recital in the condition, that the lease was made "on the agreement of the undersigned (Brachman) to become surety for the rent thereof," and this recital furnishes all the data necessary to gather the terms of the contract.

Now, it is clear that words of recital may be the foundation of an action of covenant. As where one, by deed, reciting he was possessed of lands for years by good and lawful conveyance, assigned the same with covenants and gave a bond, conditioned to perform his covenants, it was held that the recital was a covenant, and that if he had not the interest by a good and lawful conveyance, the condition was forfeited. So where

a term for ninety-nine years, if these persons should so long live, recited his interest and that one life was in being, and assigned his term, it was adjudged that this recital amounted to a covenant that the life contained. So on the demise of a coal mine, reciting that before the sealing of the indenture, it was agreed, on consideration, that the plaintiff should have the third part of the coals dug up; it was objected that this was no covenant to pay the third part, but a recital of an agreement to have it; yet HALE, C. J., held, that were it but a recital that before the indenture the parties had agreed, it would amount to a covenant; for the indenture itself confirmed the agreement and intent precedent. Platt on Covenants, 15, 16, and cases there cited.

This principle was recognized and applied in the case of *Kendal v. Talbot*, 2 Bibb R., 614.

The condition of the bond, sued on in the present action, recites an existing agreement on the part of Brachman, to answer for the rent of the leased premises in the default of Bender, and the penalty of the bond is to become discharged on his faithful performance of that agreement. We have no doubt, upon the authorities, that the action of covenant was properly brought upon this undertaking.

It was argued that the present action on this bond could not be maintained, because otherwise the defendant might be made liable for damages beyond the penalty of the bond. Whether that consequence follows, is a question not necessary to decide in the present case, and we therefore express no opinion upon it.

Judgment affirmed.

Messrs. Smith, Corwine & Holt, for Plaintiff in Error.

Messrs. Ketchum & Headington, for Defendant in Error.

PARTITION.

207

[In the District Court of Ohio, Seventh Circuit, Fairfield County, August Term, 1852.]

Before Mr. Justice Thurman, and Messrs. Justices Peck, Nash and Whitman.

TABLER AND OTHERS V. WISEMAN AND OTHERS.

[Reported by MR. JUSTICE NASH.]

Partition of a reversion—Notice of partition—Commissioners' report—Actual view—Evidence to prove commissioners sworn.

1. There may be partition of a reversion or remainder, under our statute, whatever might have been the practice at common law.
2. Notice published for six consecutive weeks, the first being more than forty days prior to the term of the court, is sufficient notice.
3. It is too late to take advantage of the omission in the commissioners' report, to state that it was made upon *actual view*, after the report has been confirmed. If it is necessary that this fact should be stated in the report, the confirmation cures the defect.
4. The fact that the commissioners were sworn may be made to appear either by the certificate of the officer administering the oath, or by the report of the commissioners, or by the return of the sheriff.

208

The case below was a petition for partition by *Wiseman et al. v. Tabler et al.*, asking partition of the reversionary rights of the parties in and to certain real estate now in possession of the widow of one Monly, as tenant in dower. Tabler was a resident of Fairfield, and had no personal notice of the pendency of the petition; but the record showed that a notice had been published in a newspaper in said county from the 11th of March, 1852, to the 15th of April following, setting forth the filing of the petition, and the substance and prayer of the same. The order of partition was made at a court begun and held on the 17th day of May, 1852. The report of the commissioners making partition did not state that *upon actual view of the premises* they made their report; nor did the fact of their having been *sworn* appear, save from the return of the sheriff, that by the *oaths* of the said commissioners he had caused partition to be made, etc.

Brasee, for the application, made the following points:

1. That there could be no partition of a reversion or remainder at law, and that the case in 11 Ohio R., 389, did not decide any such question. He also cited 2 Swan's Practice, 1232; Swan's Statutes, 616, section 13.

2. That no sufficient notice was given. He claimed that the forty days' notice must be so construed that the entire forty days should intervene between the last publication and the term of the court at which the order was to be obtained. He also insisted that in analogy to the chancery act the publication must continue for six consecutive weeks next preceding the forty days:

3. That the report was defective in not stating that the commissioners acted upon *actual view* of the premises.

4. That it did not sufficiently appear that the commissioners were sworn.

Hunter, for Defendants.

THURMAN, P. J., delivered the opinion of the court, holding,

First—That there could be a partition of a reversion. Whatever might have been the practice at common law, we think our statute is
209 broad enough to embrace the case of a reversion or remainder. It authorizes persons *having any estate* in lands to compel partition thereof. Now these parties have *an estate* in these lands, though it is an estate in remainder, and so seems to be within the words of the act. Besides, as we understand the case in 11 Ohio R., 389, *Morgan v. Staley*, it recognizes the same doctrine, and cites a case in 8 Johnson's R., 558, in support of it.

2. We also think the notice is sufficient. The statute requires forty days' notice to be given of the pendency and prayer of the petition. This notice was published six consecutive weeks, the first publication being on the 11th of March, and the last on the 15th of April, 1852; the first publication being more than forty days prior to the term of the court, at which the order of partition was made. This notice we believe to be in conformity to the general practice under this statute. The statute is silent as to the number of times the notice shall be published, but simply requires a notice to be published forty days prior to the term of the court. A single notice, inserted forty days prior to the term, is a compliance with the language of this statute, and we know of no de-

cision to prevent us from holding a single publication, made forty days prior to the term, sufficient. The better practice would seem to be to insert the notice, as in this case, for six consecutive weeks, the first being more than forty days prior to the term of the court. We believe this ruling is not only in conformity to our own general practice under the statute, but also in accordance with the decisions in other states on similar statutes. *Vide* 10 Massachusetts R., 118, *Coleman v. Anderson*, 13 Ohio R., 120; 16 Ohio R., 563.

3. We also think that it is now too late to take advantage of the omission in the report of the commissioners, that it was made upon *actual view*. This would have been a fatal objection to a confirmation of the report, had the objection been taken in time; but the court could then have given leave to the sheriff and commissioners to amend, if the amendment could have been made in consistency with the truth. We think the confirmation in this case cures this defect, and that we are bound to presume the court had evidence that the commissioners did make their report from an actual view of the premises; otherwise we cannot suppose the court would have confirmed their report. Besides, what is there in the law requiring this fact to be stated in their report?

4. That it did appear that the commissioners were sworn. We have no doubt that this fact may be made to appear either by the certificate of the officer administering the oath, or by the report of the commissioners, or by the return of the sheriff. All these methods have been followed in practice, and we hold either to be sufficient. The return in this case is in conformity to the form in Wilcox's Practice, and which we have no doubt is the better practice. 210

NASH, J., doubted as to the correctness of the ruling on the first point. He said that according to his present impression a proceeding in partition had reference to the possession, and not to the title; and hence a tenant for life, and not the reversioner, was the proper party to such a proceeding; but he supposed he must be mistaken, if the case in 8 Johnson's R. decided what it was said in 11 Ohio R. to decide.

NOTE.

When the above decision was made, the court had very little time to examine the authorities, as counsel had not collected them. The case in 11 Ohio R., 389, was a bill in chancery, and not a proceeding at law, and decides that, when a life estate covers only a part of the premises, and that life estate is owned by one of the tenants in common, a court of equity will compel partition. The judge, in his opinion, however, uses the following language: "In New York, 8 Johnson's R., 564, the chancellor held, that a tenant in common of the inheritance might maintain partition, notwithstanding a dower estate was outstanding. This was a case at law." The case here referred to is that of *Bradshaw v. Callaghan*, 8 Johnson's R., 558, and when examined will be found not to sustain the dictum of the judge. In that case no dower had ever been assigned in the premises of which partition was sought; the dower estate was only a right of some one to have dower assigned, and hence does not reach the question presented either in this case or in that in the 11 Ohio R., 389. There was no *dower estate*, but a mere right to have dower outstanding. The case of *Motley v. Blake*, 12 Massachusetts R., 280, decides the same point, that a mere outstanding right in a person to have dower in the premises, is no objection to a partition, since she has no

After a verdict of the jury, assessing the damages, the defendant moved to arrest the judgment of confirmation, which is required under the 11th section of the act, on the ground that the probate judge before whom the proceedings were had was a stockholder in the railroad. Affidavits were presented to the effect that this fact was not known to the defendant until after the verdict of the jury. It was admitted by the probate judge that he was a stockholder; that the amount of the stock was not large, and the fact of his being a stockholder totally escaped his mind at the time of the trial, or he would have refused to hear the case.

Messrs. Page & Renick, for the Defendant.

First—It is contrary to the first principles of natural justice that a man should be party and judge in a cause.

Second—By the common law, no one can be a judge in his own cause, 4 Comyn, 435; 3 Bla. Com., 298; 1 Thomas's Coke, 12, 343.

Third—It is not in the power of the legislature to alter this principle, and so far as the statute does so it is void.

By the 16th section of the bill of rights, it is declared that justice shall be administered without denial or delay. "Justice shall be administered." It is a mocking of justice to make the party the judge. It is an absolute "denial" of justice. Mr. Gill, the defendant, might have been the judge with as much propriety as a stockholder.

They cited or commented on these cases: 2 Binney, 454; *Bank of North America v. Fitzsimmons*, 13 Massachusetts, 341; *Pearce v. Atwood*, 1 Conn., 401; *State v. Babcocke*, 2 Chip., 99; *Bates v. Thompson*, 19 J. R., 172; *Bellows v. Pierson*, *Pierce v. Sheldon*, 13 J. R., 191.

Mr. Joash Miller, for Plaintiff.

First—A motion to arrest lies only where there is error on the face of the record, 2 Swan's Practice, 979.

Second—The judge was not disqualified by his interest, *Hill v. Wells*, 6 Pickering, 104; *The Justices of Burlington v. Fennimore*, Coxe, 190; *Corwin v. Hames*, 11 Johnson's R., 76.

Messrs. Paige & Renick, in reply.

First—If a judge is interested in the cause he may and must refuse to proceed at any stage of the cause. It is a matter that lies within his own breast. He is disqualified to give judgment, and when the fact is brought to his mind, he may decline to proceed. The judgment would be void, and he may refuse after verdict to enter up a judgment which would be a nullity.

Second—The cases cited of a judge sitting in a cause in which he had a minute interest are not applicable to this case. They are cases of a member of a municipal corporation, remotely interested in the subject of taxes or fines. Such a member might be a witness, and, of course, a judge. But a stockholder in a moneyed corporation has a very different interest from a member of a municipal corporation as an inhabitant of a city or village. A judgment might not be arrested, perhaps, on the ground that one judge was interested, provided a quorum of disinterested judges remained.

The court arrested judgment and the case was compromised.

INFANCY.

215

[In the District Court of Ohio, Seventh Circuit, Jackson County, August Term, 1852.]

Before Mr. Chief Justice Thurman, and Messrs. Justices Peck, Nash and Whitman.

DENNING AND CAMPBELL v. JAMES NELSON AND GEORGE W. NELSON.

[Reported by MR. JUSTICE NASH.]

Creditor's Bill—Infancy—Choses in action.

The rights of a judgment creditor, who goes into chancery to collect his judgment from persons indebted to his judgment debtor, are only the rights of the judgment debtor; whatever, therefore, would bar the action of judgment debtor, will bar the claim of the judgment creditor.

Where the judgment debtor had loaned money to a minor, it was held the plea of infancy was a bar to any claim on the part of the judgment creditor against such minor.

An infant is responsible for his torts; and a plea of infancy is no bar to an action to recover damages for the same.

Where an infant who has possession of personal property under a bailment for use, sells the same, and receives the payment after he becomes of age, the money so received may be recovered from him, and the plea of infancy will be no bar thereto.

The term, *choses in action*, as used in sec. 14 of Chancery Practice Act (Swan's Statutes, 704), includes rights of action to recover damages for a tort connected with contracts.

In a creditor's bill, a judgment creditor may recover from an infant damages arising from the sale and conversion of property of the judgment debtor, which property such infant held under a bailment for him.

This was a bill in chancery, filed by complainants, setting forth the recovery of a judgment in April, 1849, against said James Nelson, for fifty dollars and costs of suit; that execution had been issued thereon and returned; that the sheriff could find no goods or chattels, lands or tenements, of the said James Nelson, whereon to levy; the bill further charged that the said James was wholly insolvent; and that the said George W. Nelson, a son of said James, was indebted to his father in a large sum, for money had and received, loaned and advanced, and for goods sold, and for other causes.

The answer and the evidence disclosed the following state of facts: George W. Nelson was, in February, 1849, about twenty years of age; that he, in connection with another individual (who was only to advance a part of the means), obtained an apparatus for taking daguerreotypes; that his father let him have fifty dollars in money, and a horse and buggy, with which to travel in his business aforesaid; that he followed this business for some time, and not succeeding very well, he stopped about April or May in Xenia, where he went to work at his trade of a printer; and here, about the first of May, 1849, or a little later, sold the horse and buggy to one Martin, for \$125, and agreed to take his pay in board; that he boarded with Martin until after he came of age, in February, 1850; that only a small part of said sum was, however, received in board after said George W. came of age, in February, 1850. 216

Mr. Stanley, for Complainants.

Messrs. Roberts and R. C. Hoffman, for Respondents.

WHITMAN, J., delivered the opinion of the court to the following effect :

The first question presented in this case is one of fact. Was this money and property intended as an advancement, or otherwise? Although the evidence is somewhat conflicting, we have come to the conclusion that the transaction was a loan and bailment, and not a gift; hence that the respondent, George W., if he had been of age, would have been liable to account for this money and property.

The next question which presents itself, is this: Can the respondent, George W., be made responsible to these complainants for the fifty dollars thus loaned to him by his father? This question is resolved by ascertaining whether the father, James Nelson, has any claim which he could enforce at law against his said son? These complainants are seeking to enforce the rights of said James against said George W.; and whatever his rights are, such are the rights of the complainants. Now an infant is not liable for his contracts, save to a very limited extent; and a loan of money is not one of that limited number; and hence the plea of infancy is a good bar to any recovery by James against George W. for the fifty dollars thus loaned. In cases of fraud the creditor may undoubtedly follow the property so long as it can be identified in the hands of the minor, and subject it to the payment of his debts. Even money may be reached in the hands of a minor, and a court of equity would by attachment compel the minor to deliver it up to be so applied. But where the right of the debtor is a mere chose in action, then the minor can make any defense against the creditor, which he could make against the debtor, if the debtor were to bring an action at law. We hold, therefore, that these complainants cannot have a decree against George W. Nelson for the fifty dollars, so by his father loaned to him during his minority.

217 The next inquiry relates to the horse and buggy. This was a mere bailment by the father to the son for use; and the son was bound to return them to his father on the expiration of the bailment. Instead of doing this, he sold the horse and buggy, and was thereby guilty of a wrongful conversion. While a minor is not bound by his contract, he is liable for his torts. This doctrine is now too firmly established to be called in question. In *Jennings v. Rundall*, 8 T. R., 335, it was held that trover would lie against an infant for immoderately riding a horse, so that it was damaged when hired for use. In the case of *Homer v. Theviny*, 3 Pick. R., 492, it was decided that trover would lie against an infant, where he had hired a horse to go to one place, and went to another and injured the horse. So in *Lewis v. Littlefield*, 15 Maine R., 233, it was held that infancy was no bar to an action of trover, where the goods converted by the minor came into his hands under a prior illegal contract. In *Vasse v. Smith*, 6 Cranch R., 226, MARSHALL, C. J., says: "This court is of opinion that infancy is no complete bar to an action of trover, although the goods converted be in his possession in virtue of a previous contract. The conversion is still in its nature a tort; it is not an act of omission, but of commission, and within that class of offenses for which infancy cannot afford protection." The same doctrine as to the liability of infants for the wrongful conversion of property intrusted to them, is laid down in 2 Kent's Com., 241. To the same effect is the case of *Fitts v. Hull*, 9 N. Hamp., 441; *Honks v. Deal*, 3 M'Cord R., 257.

These cases settle that James Nelson has a right of action against George W. for the conversion of this horse and the buggy. The sale was made when George W. was a minor; but, if the board or pay had been received after he came of age, he might, in assumpsit for money had and received, be compelled to pay the amount thus received, and the plea of infancy would be no bar to an action brought for this purpose. The amount, however, received after he came of age must have been very small; not anywhere near enough to satisfy the claim due to these complainants. The case then presents the important question, whether these complainants can, in a bill in chancery, subject the damages due from George W. to James Nelson for this tort, this wrongful conversion of the property of James by George W. That James could maintain trover for this conversion, and that the plea of infancy would be no bar, is conclusively settled by the cases already referred to. Here, then, is a right of action in James against George, and to which the latter has no legal defense; but the action must be in tort; and yet the damages 218 are as certain as the damages to be recovered on a *quantum valebant*; they are in both cases the value of the goods, sold in the one case, and converted in the other. Can, then, these damages in trover be recovered in this bill in chancery from George W. Nelson? If they cannot, then there is a large class of claims which debtors may have, and which their creditors cannot reach. A commission merchant sells goods in violation of instructions; he is guilty of a wrongful conversion; for which in an action of trover he can be made to respond in damages. Are such damages beyond the reach of a creditor's bill? If so, the law of debtor and creditor is liable to great abuses; is manifestly most fatally defective. Why should not such a claim, though sounding in tort, be as liable to be reached by a creditor's bill, as damages in assumpsit or covenant? There is no more uncertainty as to the amount in the one case than in the other.

We do not believe that our statute is open to this objection. We believe its language is comprehensive enough to justify us in holding that these complainants can recover in this bill the damages which James Nelson could recover against George W. only by an action of trover. Swan's Statutes, 704, sec. 14. Without citing the whole section, we will refer to the following words, which we think embrace just such a case as the present. Among other matters, which may be reached by a creditor's bill, are *choses in action*, due or to become due. What then is the meaning of a chose in action? Is it limited to rights of action sounding in contract, or does it also include rights of action sounding in tort? In 1 Chitty's General Practice, 99, choses in action are defined, as "rights to receive, or recover a debt, or money or damages, for breach of contract, or for a tort connected with contract, but which cannot be enforced without action, and, therefore, termed *choses* or *things in action*." This definition of the words, *choses in action*, embraces this very case, which relates to a recovery of damages for a tort connected with contract. Here was a bailment, which is a contract, and a tort growing out of that contract, and hence connected with it. It would also seem to be a reasonable construction to hold that the creditor in such a bill is entitled to recover from the debtor of his debtor for any damages produced by him to his debtor's property, which property he would have had a right to subject to the payment of his judgment. Nor is this view of the law destitute of authority. In the case of *Hudson v. Plets*, 11 Paige C. R., 180, it is said that the mere right of action in the defendant to a creditor's bill, for a mere personal tort for assault, etc., does not pass under the assignment

919 to the receivers; but it is otherwise of a right of action for an injury to property to which the complainant has a right to resort to satisfy his claim, and which is of less value by reason of such injury. Whether the injury amount to a total destruction of the property, or to a mere diminution of its value, can make no difference, save in the amount to be recovered.

We therefore hold that these complainants are entitled to a decree that George W. Nelson shall pay the amount of the damages sustained by James by reason of the conversion of said horse and buggy; which damage we find to be the sum for which the horse and buggy was sold, to wit, one hundred and twenty-five dollars; and as this sum is more than the amount now due complainants, the complainants may take a decree against George W. for the amount due them and costs of suit.

Decree accordingly.

MANDAMUS.

[In the District Court of Ohio, Seventh Circuit, Athens County, August Term, 1852.]

Before Mr. Justice Thurman and Messrs. Justices Nash and Whitman.

STATE OF OHIO, EX RELATIONE R. E. CONSTABLE, v. E. F. MOORE,
AUDITOR OF ATHENS COUNTY.

[Reported by MR. JUSTICE NASH.]

Mandamus will lie to compel the auditor of the proper county to pay a sum allowed by common pleas to an attorney, for assisting in the prosecution of a state case.

The fact of such appointment having been made, need not be evidenced by a special entry; the allowance of a compensation for such services rendered on such an appointment will be sufficient.

The entry of an allowance to an attorney for aiding in the prosecution of a state case, is conclusive evidence of both the appointment and the amount of compensation.

A plea denying any such appointment, and averring that the entry of the allowance was made by mistake on the representation of the relator, held bad, when the application for the mandamus showed a certified copy of the entry of such allowance.

It seems that if the entry of allowance was made by mistake, or on misrepresentation of the relator, the court making it, could on motion set the allowance aside, on the authority of the case in 20 Ohio R., 344.

The petition set forth that the court of common pleas had allowed the petitioner ten dollars for aiding in the prosecution of a certain criminal, as would appear by a copy of the entry duly certified and
220 attached to the petition. The return of the auditor stated that the relator had never been appointed to aid in said prosecution by said court; but that he volunteered in said case, and said order was made under a mistake at the solicitation of the relator. The answer further alleged that there was no entry of said appointment, save as it might be inferred from the entry of said allowance. The plaintiff demurred to said return.

By THE COURT. This demurrer must be sustained. The court of common pleas made this allowance, and we must presume the facts

existed which authorized it. Nor do we think the appointment must appear from the record; though such a course would be more regular. But here is the allowance, stating it to be made to the relator for aiding in the prosecution; which aid could only have been given on an appointment made by the court on application of the prosecuting attorney. The court must have had evidence of these facts, or it had no authority to make the allowance. Nor do we think that this court can retry that question in this proceeding. If the order was made through error, the court making it has power to set it aside, 20 Ohio R., 344; but while it stands unvacated, it is of absolute verity and must be obeyed. Let a pre-emptory mandamus issue.

ADEMPTION OF LEGACIES.

246

[In the District Court of Ohio, Seventh District, Athens County, August Term, 1852.]

Before Mr. Justice Thurman and Messrs. Justices Nash and Whitman.

JOHN CORY AND WIFE V. RUFUS W. LENTNER.

Parol evidence of testator's intention—Advancements.

▲ legacy given in bar of any claim the legatee has against the testator, is adeemed by the payment of the claim during the life of the testator.

Parol evidence may be received to explain the intention of the testator in making such payment.

The declarations of the testator made at the time of the payment, are competent evidence to explain his intention in making payment.

▲ legacy may be adeemed by advancements made to the legatee by the testator in his lifetime, if the evidence shows such to have been his intention.

This was a bill in chancery, filed by the complainants against said Rufus W. Lentner, to recover a legacy given to the wife of said John Cory in the will of her and said respondent's father, Jacob Lentner. The devise on which this claim was founded was in the following words: "I give and devise to my beloved wife, Lydia, and to my son, Rufus W. Lentner, all my real estate, in equal moities, and my said son Rufus shall pay all my just debts; and my son Rufus shall pay to my daughter, Mary Jane Cory, fifty dollars, in bar of all claims she has against my estate." It appeared by the answer and the evidence, that after the making of the will, and before the death of the testator, the complainants collected any and all claim the wife had against her father, and that at the time the testator paid said claim he declared that it would be and was in satisfaction of said legacy.

Wilson, for Complainants, insisted that parol evidence could not be received; that it would vary the written will, which could not be done. He cited 18 Ohio R., 247.

H. T. Brown and *R. C. Hoffman* cited 1 Jarman on Wills, 796, 277 and 282. They claimed that the case in 18 Ohio R., 247, did not apply to the facts of this case.

The opinion of the court was delivered by Mr. Justice NASH:

We have examined this case with some care, and we entirely concur in the opinion of NASH, J., delivered in the court below, which we find

247 among the papers. The devise is in its terms conditional, and the legatee cannot have both the legacy and the debt. Without any examination of the authorities, we should not have hesitated in holding that under such a devise as this contained in this will, the collection of the debt in the lifetime of the testator was an ademption of this legacy; but the authorities referred to in the opinion delivered by the court below fully sustain this view of the case. We will now refer to that opinion as the opinion of this court.

The first question presented is, was the legacy designed to be a payment of the claim due the said Mary Jane? The very terms of the will would seem to settle this beyond all possibility of dispute. And the language of the will is only in conformity to the rule in equity. The authorities establish the rule that a devise of a sum of money to a *child* is to be taken as a satisfaction of any debt that child has against the testator. 2 Story's Equity, 360, sec. 1099, *et seq.*; 1 Atkin's R., 426. By the terms of this will there is no room for supposition or presumption. The legacy is declared to be in bar of any claim the said Mary Jane may have against his estate. Had this claim remained unpaid, can there be any doubt that the legatee would have been put to her election whether to enforce her claim or to receive the legacy? She certainly could not have claimed both without violating the unequivocal intention of the testator. Election is the obligation imposed upon a party to choose between two inconsistent or alternative rights or claims, in cases where there is a clear intention of the testator that the legatee should not have both. 2 Story's Equity, 335, sec. 1075; *Dillon v. Parker*, 1 Swanston's R., 394, and note. The legatee in this case must have elected between this legacy or her claim; she could not have had both. *Groves v. Boyle*, 1 Atkin's R., 509.

Was the collection of this debt or claim in the lifetime of the testator an ademption of this legacy? This is the remaining question in the case.

The evidence shows that such was the intention of the testator. But it is claimed that this evidence is incompetent, and cannot be received to explain the intention of the testator in making this payment. In *Rosewell v. Bennett* (3 Atkin's R., 77), Lord Hardwick decided that the declarations of a testator might be received to show his intention in advancing money to a legatee in his will, and whether he designed the advancement to be in satisfaction of a legacy contained in his will before that time executed. The same doctrine was recognized in *Wallace v. Pomfret*, 11 Vesey's R., 542. The question in that case was whether a legacy was in satisfaction of a debt of much smaller amount. And evidence was received 248 of the declarations of the testator, that such was not his design; thereby overcoming the rule of equity that such a legacy was presumed to be in satisfaction of the debt. Similar testimony was admitted in the case of *Richards v. Humphrey*, 15 Pick. R., 133. This evidence is then competent to explain what were the intentions of the testator in making this payment.

Was, then, the payment of this claim by the testator in his lifetime an ademption of this legacy? The authorities seem very clearly to answer this inquiry in the affirmative. The law upon this subject is thus stated in the above case of *Richards v. Humphrey*, 15 Pick. R. 136: "If, therefore, a testator, after having made his will containing a general bequest to a child or stranger, makes an advance, or does other acts, which can be shown by express proof or reasonable presumption to have

been intended by the testator as a satisfaction, discharge or substitute for the legacy given, it shall be deemed in law to be an ademption of the legacy." Per SHAW, C. J. And therefore it was held in that case that a payment by a testator in his lifetime, to his sister, of \$466, was *pro tanto* an ademption of a legacy of \$500 contained in his will before that time executed; it being shown by parol and written proof that such was the intention of the testator at the time he made the payment. In *Rosewell v. Bennett*, 3 Atkin's R., 77, the testator directed his executor to lay out a sum not exceeding £300 in putting out the defendant apprentice; and in his lifetime laid out £200 in putting out the defendant clerk to a person in the navy office, and died without revoking his will. Parol evidence was read to show the intention of the testator in advancing this sum of £200; that it was intended to be in lieu of the legacy. And Lord Hardwick held the advancement to be an ademption of the legacy. The same doctrine is recognized in *Bellasis v. Uthwatt*, 1 Atkin's R., 426, and all the earlier cases are collected in note 2, to that case. *Vide Ackworth v. Ackworth*, 1 Bro. Cha. R., 307, note; *Warren v. Warren*, 1 Bro. Cha. R., 305; *Finch v. Finch*, 4 Bro. Cha. R., 38.

In the present case, a legacy was given expressly in bar or satisfaction of a claim due the legatee. Had the claim remained unpaid until the death of the testator, the law is clear that the legatee could not now have had both her debt and the legacy. Can she obtain both by enforcing the collection of the debt in the lifetime of the testator? I think not. The legacy has been paid by the payment of the debt; and surely this must be an ademption of the legacy, if the voluntary advancement of a sum of money to a legatee by the testator in his lifetime can be held to be an ademption of a legacy? In both cases it is the intention of the testator which is to govern. The intention here is clear, as well from the wording of the will as from the testator's declarations made at the time of the payment, that by the payment of the debt he intended to satisfy the legacy. I think, therefore, the complainants cannot recover; and the bill must be dismissed with costs. 249

BILLS OF EXCEPTIONS.

[In the District Court of Ohio, Third District, Wood County, September Term, 1852.]

Before Mr. Justice Corwin, Presiding, and Messrs. Justices Hall and Palmer.

THOMAS BAYES, ADMINISTRATOR OF JAMES MCQUILLING, v. JACOB ZIMMERMAN.

[Reported by J. MURRAY.]

Judicial notice of the terms of court.

This was a writ of error to Fulton common pleas, brought to Wood county for decision. The bill of exceptions in the case is signed by the president judge of that subdivision "as of the June term, 1852," and bears date July 7, 1852. The record shows that the June term of court commenced on the 17th day of that month; but there is nothing in the record showing that the June term of common pleas did not close until after the 7th day of July, nor is there any record evidence showing when that term actually closed.

Messrs. J. H. Reid, Spink & Murray, for Plaintiff in Error.

Messrs. Commage & Upham, for Defendant.

CORWIN, J., held that the court would take judicial notice of the time when the June term of the court of common pleas of Fulton county closed; and being satisfied that the bill of exceptions was not actually signed during the time at which the judgment was rendered, it was not properly before the court, and there being no error in the remainder of the record, the judgment of the court of common pleas was affirmed.

250

CONVEYANCES.

[Hamilton, Ohio, Court of Common Pleas, October Term, 1852.]

Before Mr. Justice Matthews.

LESSEE OF HENRY LORE'S HEIRS V. JOHN TRUMAN.

Consideration of deeds—Undue influence—Mental incapacity.

In the year 1841, when Henry Lore was about eighty-eight years of age, he made a deed of gift of forty-eight acres of land, part of his homestead, situated in Hamilton county, to his son Zacharias, aged about fifteen years—the only issue of his third marriage. He afterward sold a small portion of the tract so given to his son; and in 1842, about two months before his death, he made another deed to Zacharias, whereby he again conveyed the first named tract, excepting the lot which had been sold, and adding another piece, to make up for the quantity sold. A few months before the execution of the first deed, the father made a deed of land sold to one Barcus; on the same day of the execution of the first deed, to Zacharias, he made two other deeds, one of which was to his son Thomas, one of the lessors of the plaintiff; and on the day of the execution of the last deed, he executed a deed to Amerman for a lot sold to him.

After the death of his father, Zacharias' deeds were recorded, and he went into possession under them. After attaining his majority, he died, leaving a will, under which his half-brother, the defendant, derives his title and possession.

There was proof going to show that the old man had given land to his older children, and that he was desirous to help the son of his old age. This suit was brought by four of the older children to recover as heirs at law, notwithstanding the deeds of their father to his son Zacharias, on the ground that at the time of executing those deeds, he was under undue influence, and that, by reason of sickness and senility, he was incompetent to make a deed, or any other contract.

On the part of the defense it was claimed, that the grantor had sufficient mental ability to make a deed of gift or a contract, and that no undue influence was used to obtain the deeds. The only influence shown by the proof to have been exerted was a desire on the part of the mother of the boy that her husband should make a provision for him, as he had done for his other children.

Upward of sixty witnesses testified in the cause, and the opinions of the witnesses as to the imbecility of mind of the grantor conflicted with each other. 251

Messrs. Eaton, J. H. Jones, and Johnston, appeared for the plaintiff, and claimed :

1. That the deeds were never delivered to Zacharias, and were therefore void. 3 New Hampshire, 36, 304; 2 Greenleaf, 181; 12 Johnson, 420; 6 Cowen, 619; 12 Wendell, 105; 1 Alabama, 61; 10 Massachusetts, 457; 3 Phillips on Ev., Cowen & Hill's Notes, 1281.

2. The consideration (\$50) named in the deeds having failed, the deeds cannot be sustained by proving a good consideration. 16 Ohio, 438; 3 Cowen, 537; 4 Cowen, 427; 9 Cowen, 69; 8 Cowen, 406; 2 P. Williams, 203; 7 Johnson, 441; 16 Johnson, 47; 1 Harris & Johnson, 527.

3. A party admitting title in another is estopped from setting up title in himself. 12 Wendell, 57; 2 Johnson's Cases, 353.

Messrs. Storer, G. E. Pugh and Ball, for the defense, made, among others, the following points :

1. Extreme old age and its consequent infirmities, will not disqualify a man from making a deed of gift or a will. 5 Johnson's Chancery R., 158; 1 Green's Chancery R., 8, 825; 2 Ben. Monroe, 74, 79; 4 Washington C. C. R., 263; 2 Green's Chancery R., 563, 605; 8 New Hampshire R., 391.

2. Mere weakness of understanding is no objection to a man's disposing of his property by deed of gift to his son. 3 Denio, 37, note; 4 Cowen, 207; 2 J. J. Marshall, 341; 21 Wendell, 142; 24 Wendell, 85; 26 Wendell, 255.

3. Neither persuasion nor improper influence will affect the validity of a deed in a court of law. 2 Wendell, 78; 3 Denio, 43; 3 Leigh's R., 267.

4. The heir cannot dispute the deed of his ancestor, either as to consideration or for fraud. 15 Ohio, 408, 108; 19 Ohio, 1.

5. A deed of gift is valid, although retained by the grantor until his death. 1 Johnson's Chancery R., 256, 336; 11 Vermont, 621; 5 Shep., 391; 2 Hill, 554; Cro. Car., 550; 23 Wendell, 43; 1 McLean, 321; 10 Ohio, 273.

6. Although the deed purports to have been executed for a valuable consideration, it may be shown by parol that a gift was intended. 4 Dev. N. C., 355; 4 Dana, 621; 5 S. & M., 238; Wright, 753; 2 Hill, 554; 18 Pick., 397; 22 Pick., 376.

MATTHEWS, J., charged the jury substantially as follows :

Gentlemen of the Jury.—The lessors of the plaintiff having proved title to the premises described in the declaration in Henry Lore, Sr., and themselves to be his heirs at law, are *prima facie* entitled to recover. 252

Proof, on the part of the defendant, of the execution and delivery of the deed from Henry Lore, Sr., to Zacharias Lore, dated 25th October, 1841, or of the execution and delivery of the deed between the same parties, dated 18th August, 1842, overcomes this case of the plaintiff, and entitles the defendant to a verdict.

It is incumbent on the defendant, in order to avail himself of these deeds, to satisfy you,

1. That Henry Lore, Sr., *signed* them.

This he could do by writing his name himself; by making his mark, either by his own unaided strength, or with the assistance of another person, in steadying his hand and tracing the lines for him, or simply by verbally authorizing another to make the whole signature for him, provided it is done in his presence.

2. That he *sealed* them. Prefixing his signature to the scrawls is an adoption of them, and sufficient.

3. That he acknowledged the signing and sealing, in the presence of two witnesses, who have attested the same, and subscribed their names to such attestation.

4. That such acknowledgment was made before a justice of the peace, who has certified to the same, and subscribed his name to the certificate.

Proof on the part of the defendant of the signature to the deeds in question of Henry Lore, Sr., the grantor, of those of the subscribing witnesses, and of the signature of the justice, and his authority as such, is sufficient proof, in the first instance, of the execution and acknowledgment of the deeds.

Proof that the justice of the peace claimed rightfully to act as such, and was in the habit of acting as such, is competent proof of his official character.

5. That the deeds in question were *delivered*.

Without and until delivery a deed does not take effect; but possession of the deed by the grantee is *prima facie* evidence of its delivery. To constitute delivery, it is not necessary, however, that there should have been a formal transfer of the possession of the deed by the grantor to the grantee, nor of the land conveyed.

253 A delivery of the deed is sufficiently proved, if it appear, from the circumstances attending its execution, or from what takes place at any subsequent time in the life of the grantor—from what the grantor either did or said, or assented to, on the part of others—that it was his intention at the time, that the deed should then take effect and pass the title. 5 Barn. & Cress., 671.

It is not necessary that the grantee should accept the grant, or even know of it. It is enough if he does not repudiate it. The law presumes his acceptance till his refusal is proven.

A question has been raised with reference to the consideration of these deeds. By the technical rules of the English law, a consideration was necessary to support every conveyance of land. This might be either a *good* consideration, such as *natural love and affection*, etc., or it might be a *valuable consideration*, such as *money, marriage*, etc. A man, however, may make a gift of his lands; and although it may be necessary to state in the deed that it was for either a *good* or a *valuable* consideration, it is not necessary that any such consideration should actually pass from one party to the other. The grantor cannot rescind his grant, because the consideration expressed was not actually received; and neither can his heirs, for they stand precisely in the situation of the grantor. They are not allowed to contradict the fact that the consideration was received, as stated in the deed. And the consideration is sufficient, although it is merely nominal, as of one dollar for land worth a thousand. A voluntary conveyance, that is, one for natural love and affection, or for a valuable consideration merely nominal, is good against the heirs of the grantor in all cases, unless it was obtained from him by fraud or coercion.

If, then, gentlemen of the jury, you should be satisfied that the proof of the execution and delivery of either of the two deeds in question, by Henry Lore, Sr., is sufficient, there must be a verdict for the defendants, unless,

1. The lessors of the plaintiff prove to your satisfaction that the two deeds were obtained from their ancestor by fraud or coercion.

2. Or unless they establish, beyond a reasonable doubt, that at the times the two deeds were respectively made, Henry Lore, the grantor, was incapable, from want of reason, to make them.

In the investigation of these two questions, you must remember, gentlemen, that both as to fraud and want of capacity, the burden of proof is upon the lessors of the plaintiff. They must establish the facts claimed affirmatively, and beyond a reasonable doubt. The law presumes a deed to be fair until it is proved to be fraudulent, and a man to be sane until the contrary is established. It is sometimes said that at law fraud must be proved, and cannot be presumed, but that in chancery it may be presumed. The meaning of this is, that in chancery, contracts and deeds may be set aside on an inference of fraud, arising out of the policy of the law, from the relations of the parties, as when they are guardian and ward, attorney and client, trustee and *cestui que trust*, etc., or from the nature of the contract itself, as where the consideration is shockingly inadequate; while, at law, such deeds would be good to pass the legal title, until set aside by a court of chancery. But in a court of law, as well as of equity, fraud may be proved by circumstances sufficient in the minds of the jury to establish the fact that it was actually committed; and there need not be express proof from the lips of an eye or ear witness as to the concoction and execution of a scheme of fraud. 254

You must be careful, too, gentlemen, to distinguish between deeds obtained by *fraud or duress*, and deeds obtained from the grantor by the persuasion or influence of the grantee over him, or of some one for and in his behalf.

A person has the legal right to obtain a deed from another, competent to convey, no matter how much persuasion or importunity he uses, nor what amount of influence he has acquired and exerted over him. There must have been some *deceit* with reference to the very transaction practiced upon him, for the purpose of getting him to execute the deeds, and without which he would not have consented to make them; such as the substitution of a description of one piece of land for another, without his knowledge; reading the deed in one way, when it was written differently, in a material matter; getting him to sign it, on the supposition that it was some other paper, etc. These examples are put simply as illustrations, not by way of enumeration.

A deed is obtained by coercion when it is got by force or threats of force.

The question of fraud, as well as that of coercion, is a question of *consent*. It is no matter if that consent was obtained by entreaty, by solicitation, by importunity, argument or persuasion. If it was a *compliance*, obtained by stratagem, deceit, imposition or misrepresentation, or extorted by force or fear, it is not *consent*, and there can be no deed without consent.

The great question in the case, however, you will have perceived, is as to the capacity of Henry Lore, Sr., to execute the deeds in question.

The points of time to which your inquiry as to the state of his mind must be directed and confined, are the two specific occasions
 255 when the deeds in question were executed and delivered. The testimony as to his mental condition at other periods of his life are not of the slightest consequence, except as it may serve to throw light on his condition at the two dates referred to.

You are not to be governed, either, by the opinions of the witnesses as to the question of mental soundness. Those opinions have been admitted, and are competent testimony; but they derive their whole value from the facts and reasons on which they have been based, and you must scrutinize those facts and reasons, adduced as the ground of their opinions, in order to test their correctness.

To have been legally competent to make the deeds in question, Henry Lore must have been, at the time they were executed and delivered, a sane man, of sound mind, possessed of memory, will and understanding.

The language of many of the law books defining that unsoundness of mind which deprives its subject of legal capacity to bind himself by his acts, is that it consists of a complete, entire and total deprivation of memory and understanding.

This rule seems to be laid down with reference to that general incapacity of a person, which, in the eye of the law, renders it impossible for a man to do any binding or efficacious act, and indicates undoubtedly the extent of proof required *necessarily* to avoid all the transactions in which a man has participated. The law, out of a jealous regard to the right of individuals to dispose of their property, takes it for granted that they have capacity to exercise that right as long as they have capacity to do anything, involving in any degree the use of reason. Of course, then, when it is proved that a man is entirely destitute of sense, it follows that any deed which he may have made is rendered void; but it is not necessary, in all cases, to prove that extreme of unsoundness, to avoid each particular deed. In other words, the abstract capacity to make deeds in general is supposed by the law to remain as long as reason glimmers, even in the feeblest manner; but to prevent a particular deed from being avoided, for lack of intelligence in the grantor, it must further appear that the low degree of reason of which remains shone upon and enlightened the particular disposition of property which it contains.

It is clear, however, that mere *weakness of understanding* is not, of itself, sufficient to invalidate a conveyance. A modern writer repeats an old rule upon this subject in the following language: "A person, being
 256 of weak understanding, so he be neither an idiot, nor a lunatic, is no objection in law to his disposing of his estate. Courts will not measure the *extent* of people's understanding or capacities. If a man, therefore, be legally *compos mentis*, be he wise or unwise, he is the disposer of his own property, and his will stands as a reason for his actions." 26 Wendell, 301.

So mere old age, with its naturally consequent feebleness and infirmity of body and mind, unless it extinguishes the light of reason, is not sufficient, alone, to invalidate a deed.

Eccentricities and occasional absurdity and foolishness of conduct, also, are not sufficient for that purpose. Many men of distinction, in point of intelligence and sagacity, are sometimes guilty of these. Men of genius occasionally, at least, are not men of sense. Neither is it the test

of a man's capacity to make a legal and binding conveyance, whether he is competent to transact the general and usual business of life—to carry on the business of a farm, to make a prudent contract, and the like.

The meaning of a rule, as to the amount of mental capacity required in the execution and delivery of a deed, can be best understood from the reason of the rule. The reason why soundness of mind is necessary, in law, to enable a man to contract or convey, is because *consent* is of the essence of a contract and conveyance, and there can be no consent without understanding.

The best summary I have been able to find of the true rule of law upon this subject, is in the following extract from the opinion of the court of errors in the case of *Stewart's Executors v. Lispenard*, 26 Wendell's R., pages 306-7.

"If we sum up the whole doctrine of the law of wills, as affected by mental incapacity, we shall find it just, reasonable, and consistent with itself, as well as in perfect harmony with the decisions and rules, touching the effect of unsoundness or weakness of understanding, in avoiding deeds and contracts. The right of testamentary disposition is regarded as a common and natural right, to be restricted no further than public policy and the necessary evidence of intent and consent absolutely require. When the testator is shown to possess such a rational capacity as the great majority of men possess, that is sufficient to establish his will. 'When this can be truly predicated, bare execution is sufficient' (per Sir J. Nichol, 1 Hagg. R., 385), no matter how arbitrary its provisions, or how hard or unequal may be its operation on his family. On the other hand, when a total deprivation of reason is shown, whether from birth, as in idiocy, or from the entire subsequent overthrow of the understanding, whether permanently or existing only at the time 257 of execution, further inquiry is needless; the will is itself a nullity, however just and prudent in its provisions, and with whatever fairness of intention it may have been obtained by well-meaning friends. That intermediate class, who fall below the most ordinary standard of sound and healthy minds, whether from the partial disease of one faculty, or the general dullness and torpor of the understanding, are not on that account interdicted from the common right of citizens, and least of all from that of testamentary disposal. But their defect of intellect may furnish most essential and powerful evidence, in union with other proof, that some particular will or codicil was obtained by fraud and delusion; that it had not the consent of the will and understanding, and was not executed by one who, *in that respect*, was of a sound and disposing mind and memory. As in the former class of cases, there is a general legal disability, because the party from total unsoundness of mind and memory is unable to consent with understanding to any legal act whatever; so in the latter instances, there may be shown an absence of consent to the particular will from inability to comprehend its effect and nature."

This view of the law applies as well to deeds and other contracts as to wills.

At the time of the execution and delivery of the deeds in question, therefore, you must be satisfied that Henry Lore, Sr., had not sufficient mental capacity to have been able to give to whatever was essential to be done on his part *an intelligent consent*, before you will be justified in treating them as void.

This implies a knowledge of the other party to the deeds, his son, Zacharias Lore; a knowledge of the subject matter of the conveyances—the property conveyed; a consciousness of the acts of signing, sealing, acknowledging and delivering the writings, as deeds; a knowledge that the effect of the transactions was to divest himself of the title to the land, and to vest it in Zacharias Lore; and, lastly, a knowledge of the immediate and necessary consequences of the transactions, not only as between the parties themselves, but such others as were immediately affected by them. In other words, if he had sufficient intellect to understand, in a general way, the nature and effect, and immediate consequences of the transactions here drawn in question, and consented to them, they are valid and binding.

If you so find them, the defendant is entitled to a verdict; if not, it will be for the plaintiff.

268 The jury thereupon retired, and returned a general verdict for the plaintiff.

Motion for new trial by defendant's counsel:

1. Verdict against law and evidence.
2. Verdict general for the whole land, when, by the proof, the lessors were only entitled to four undivided sevenths of the land.

Mr. Ball, for the motion.

Mr. Jones, resisted.

The court held that the case cited was in point, and that unless plaintiff's counsel agreed to enter a *remittitur* for three-sevenths of the land, the verdict should be set aside, and a new trial granted. Terms agreed to, and judgment entered for four-sevenths.

Case appealed to district court.

271

PROMISSORY NOTES.

[In the District Court of Ohio, Hamilton County, November Term, 1852.]

GREENOUGH AND OTHERS v. SMEAD & COLLARD.

[Reported by Mr. JUSTICE MATTHEWS.]

Joint makers—Guarantors—Position of indorsements on notes—Demand on joint makers—Construction of Curwen's Statute, chapter 527, section 1; chapter 975; 42 Laws, 72; 48 Laws, 33.

George H. Bates wishing to effect a loan, applied to Greenough and obtained his signature upon the back of a blank note, which G. H. B. afterwards filled up, by making it payable to the order of Samuel R. Bates, who then indorsed it by writing his name *under* that of Greenough. It was subsequently indorsed by Butler & Brother, and in that form discounted by Smead & Collard, for George H. Bates. *Held*, that upon the face of the note, without resort to other evidence, Greenough was to be considered *prima facie* not a guarantor, but an indorser subsequent to the payee. The legal order of indorsements cannot be controlled by the accidental position of the names of the indorsers. An indorser's legal position among the parties is determined by the relation, in point of time, which his indorsement bears to that of the others. The fact that the indorser's name is above that of the payee is immaterial.

Held, further, that upon the facts as above stated, Greenough was, in contemplation of law, a joint maker with George H. Bates. The case of *Ellis v. Brown*, 6 Barbour's Supreme Court R., 283, is not law in Ohio.

Demand upon one of the makers of a joint and several promissory note, is sufficient to charge the indorsér. The case of *Harris v. Clark*, 10 Ohio R., 5, approved and followed. The case of the *Union Bank of Weymouth v. Willis*, 8 Metcalf's R., 504, disapproved.

The plaintiffs suing upon a note indorsed in blank, cannot be compelled to fill up the blank indorsement. The case of *Hubbard v. Williamson & Roane*, 4 Iredell's Law R., 266, disapproved.

The Ohio statute of March 12, 1844 (Curwen's Statutes, chapter 527, section 1; 42 Laws, 72), providing "that the plaintiff may commence and prosecute a joint action for money had and received against all the original makers and indorsers of any promissory note, etc., and may give such bill or note in evidence; and each of the defendants may plead separate pleas, and make separate defenses," etc., does not change the rules of evidence as to the testimony of co-defendants, in favor of each other. Such testimony is not admissible in an action on a contract. Neither does the act of March 23, 1850, to improve the law of evidence (Curwen's Statutes, chapter 975; 48 Laws, 33), render such co-defendants admissible witnesses in favor of each other. To render a party to the record competent, under that statute, he must be called by the adverse party, or by one of several adverse parties. (The Code has since changed this rule.)—[EDS. W. L. J.]

This was a writ of error to the commercial court of Cincinnati.

The opinion of the court was delivered by Mr. Justice MATTHEWS.

The suit in the court below was assumpsit, under the statute, against the makers and indorsers of a promissory note.

The instrument was as follows :

"\$4,000.

CINCINNATI, 30th May, 1850.

"Sixty days after date, I promise to pay to the order of Samuel R. Bates, four thousand dollars. Value received. 272

(Signed)

"GEO. H. BATES."

Indorsed in the following order :

"B. F. GREENOUGH,

"SAM'L R. BATES,

"BUTLER & BROTHER."

The execution of the note, as it appears from the bill of exceptions, was admitted. The plaintiff then called a notary, who proved on the 1st of August, 1850, he went with the note to the place of business of Geo. H. Bates, for the purpose of demanding payment, and found it closed. He then went to his residence, and learned from a servant that Mr. Bates had died that morning, and no one was there to attend to business. He met, on his return, the clerk of Geo. H. Bates on the street, and presented the note and was told that it would not be paid. Notice was duly given to Greenough, to Samuel R. Bates, and Butler & Brother, of the demand and refusal.

The plaintiffs rested and a motion for a nonsuit was overruled.

The defendants then required the plaintiffs to fill up the blank indorsements on the note before they would proceed in the case. The court refused to make the requisition, and the plaintiffs declined to do it; and the defendants excepted.

B. F. Greenough and Samuel R. Bates were then successively called by Butler & Brother their co-defendants, as witnesses for them. This was objected to by the plaintiff, but the objection was overruled, and the witnesses permitted to testify. To this the plaintiffs excepted.

These witnesses prove in substance, that Geo. H. Bates, wishing to effect a loan, applied to B. F. Greenough, and obtained his signature

upon the back of the note. It was then, however, a mere blank. He afterward filled it up, as it now appears, payable to Samuel R. Bates, who then indorsed it, writing his name under that of Greenough. It was subsequently indorsed by Butler & Brother, and in that form taken by Geo. H. Bates to Smead & Co., the plaintiffs below, and discounted for him.

The cause was submitted to the court, and judgment rendered for the plaintiffs below, to reverse which the present writ of error was prosecuted.

273 The counsel for plaintiffs in error urge the following grounds for reversing the judgment:

1. That Greenough is liable upon the note, only as guarantor, and cannot be joined with the maker and indorsers in a joint suit.

2. That if not guarantor, he is liable as a maker, jointly with Geo. H. Bates, and that demand of payment should have been made upon both before the indorsers can be charged.

3. That the court below erred in not requiring the plaintiffs below to fill up the blank indorsements.

It is undoubtedly the law in this state, that when a stranger to a note indorses his name in blank upon it, he is to be held, *prima facie*, as a guarantor. If it be proved that the indorsement was made at the time of the original execution of the note, or subsequently, in pursuance of an intention to become responsible as such, he will be regarded as a maker of the note. *Robinson v. Abell*, 17 Ohio R., 36; *Champion v. Griffith*, 13 Ohio R., 228.*

And such undoubtedly would be the position of Greenough upon this note, if it were now held by Samuel R. Bates, the payee; because then it would be apparent that Greenough was a mere stranger. But can that be said of him when the note came into the hands of Smead & Co.? We think not. They had as much right to look upon Greenough as a party to the note as S. R. Bates, or Butler & Brother. The fact that the note was discounted for Geo. H. Bates made no difference. That only shows that the other parties had become so for his benefit and accommodation. The fact that Greenough's name was above that of S. R. Bates, seems to us, also, entirely immaterial. It makes no difference on what part of the note the name of an indorser is written. His legal position among the parties is determined by the relation, in point of time, which his indorsement bears to that of the others. If Smead & Co. had a right to deduce their title through Greenough, they had a right to regard him as a party to the note. It is plain they could do so. The legal and logical order of the indorsements cannot be controlled by the accidental positions of the names of the indorsers upon the paper. Smead & Co., therefore, had a right to regard Greenough as a party to the note; he was so in legal contemplation, the note being in their hands. He is to be considered, therefore, *prima facie* not a guarantor, but an indorser, subsequent to S. R. Bates.

274 If we look into the testimony of B. F. Greenough and S. R. Bates, it becomes apparent that the former was, in fact, a joint maker with Geo. H. Bates. Such seems to be the undoubted result of the authorities, both in this state and elsewhere, except, perhaps, in New York. We are referred by the counsel for defendants in error to the case

* See 8 Western Law Journal, 111—[Eds.]

of *Ellis v. Brown*, 6 Barbour's S. C. R., 283, in support of the proposition that, in this case, Greenough is to be considered as indorser and not as a maker. In that case, upon a note made by Stone & Greene, payable to Newell, Daniels & Co., and indorsed by Orrin Brown before delivery to the payees, it was held that Brown was not liable as maker, and could not be charged as indorser by the payees, inasmuch as, in legal contemplation, he was subsequent party to them. In this state, however, it is clear that the law is otherwise; and upon the facts, as proven in this case by Greenough and S. R. Bates, we have no hesitation in saying that Greenough was liable as a joint maker of the note.

It is an important question, however, whether we are authorized to look into the testimony of Greenough and S. R. Bates. We are clear that they are incompetent witnesses, and ought not to have been admitted. They are parties upon the record as defendants, and could not, by any provision or principle of the law with which we are acquainted, be called as witnesses, except by the adverse party. It is true the several defendants might have been sued separately, but the statute requires the suit to be joint against the makers and indorsers of promissory notes, under the penalty upon the plaintiff of not recovering costs but in one suit. The fact that the statute authorizes separate pleas and defenses by the several defendants, does not, in our opinion, render the witnesses admitted any the less incompetent. If this be an inconvenience or a hardship, it is one for legislative remedy. It is not within the reach of judicial relief.

But admitting the testimony and the consequence—that Greenough was in fact a joint maker of the note with Geo. H. Bates—still no ground is furnished for the reversal of the judgment. In *Harris v. Clark*, 10 Ohio R., 5, it was decided that a demand upon one of three joint and several makers of a promissory note is sufficient to charge an indorser. The reasoning of Judge HITCHCOCK in that case seems to us conclusive, and the rule laid down the only safe and reasonable one that can be adopted. We are referred indeed, to an adverse decision of the supreme court of Massachusetts, in the case of the *Union Bank of Weymouth v. Willis*, 8 Metcalf's R., 504. This case was subsequent to the Ohio case, and takes no notice of that decision. It does lay down the rule as 275 claimed by the plaintiffs in error, but in addition to the greater deference which we owe to the decisions of the supreme court of our own state, we are much better satisfied with the rule which it has adopted. It is true that in this case no actual demand was made upon either of the makers; but the holder used all the diligence to make a demand to which he was bound. He has done what the law deems equivalent to a demand, and he considers that sufficient to charge the indorsers.

The only remaining objection to the judgment, is the alleged error of the commercial court in not requiring the plaintiffs below to fill up the blank indorsements. The only object in such a requisition would be to compel the plaintiffs below to show their title. The only important fact to be proved was that the plaintiffs had a title; the particular manner in which they chose to deduce it was immaterial. A blank indorsement is an order to pay to bearer, and the plaintiffs below had the right to fill up the indorsements in any manner they pleased; or, if their title appeared without any additions, it was not necessary, and they could not be required to make any. The case of *Hubbard v. Williamson & Roane*, 4 Iredell's Law R., 266, is certainly an authority in favor of the position taken by the plaintiffs in error. The reasons given in that case are

purely technical, for it is admitted that the indorsements might be connected at any time during the trial. If it was true that a second indorser could only be supposed to have ever had title to the note, by virtue of a special indorsement to himself, the rule would be reasonable. But every indorsement in blank is an indorsement to the bearer, and makes a separate contract, which the holder might separately enforce against the particular indorser; and there seems to us no valid reason why the same thing should not be permitted when the action is joint against all the indorsers. It is not upon the contract between the several indorsers upon which the holder sues. He seeks a recovery upon the separate contract of each indorser with himself. It is not necessary, therefore, to establish his title against each indorser, that the title of that indorser should also be shown. We think the commercial court committed no error in this particular, and that, on the whole, the judgment must be affirmed.

Messrs. Ghoison & Wisner, for Plaintiffs in Error.

Messrs. Morris, Tilden & Rairden, for Defendants in Error.

309

CANAL FUNDS.

[In the Court of Common Pleas of Franklin County, O., Columbus, March, 1853.]

Before Mr. Justice Bates.

THE STATE OF OHIO v. LUCIEN BUTTLES, EXECUTOR OF JOEL BUTTLES, DECEASED.

Distinction between a deposit and a loan—State contracts—Implied power of state agents—Power of canal fund commissioners over the canal funds—Construction of the embezzlement law, Curwen's Revised Statutes, chapter 700—Contracts prohibited by law, expressly and impliedly.

Where a party confides a sum of money to another, who is to return to him, upon demand, a like sum, and not the identical money, the transaction is a simple deposit. If any other terms or conditions enter into the contract, it does not assume the character of a deposit. If the fund cannot be withdrawn at the pleasure of the creditor, but is to remain for a certain period in the hands of the debtor, it becomes a gratuitous loan. If it is to be repaid with interest, it becomes a loan upon interest.

The commissioners of the canal fund of Ohio, being "officers, agents or servants of the state," expressly forbidden to loan out with or without interest, any money or valuable security received by them, or which may be in their possession or keeping, or over which they may have supervision, care or control, by virtue of their office, agency or service; can make no loan of the funds belonging to the canal fund.

No contract is binding which is expressly forbidden by law. If a law forbids or enjoins certain acts, and a contract is made, the consideration of which involves a violation of the statute, the purpose of the law is looked to, to ascertain whether such contract be void or not. If the law have in view merely the increase of the revenue, the contract is valid; if it have in view the protection of the public against such acts and contracts, the contract is void. The case of *Harris v. Runnels*, 12 Howard, 79, commented on and explained.

310 If a third person enters into a covenant to secure the repayment of money, loaned by a state agent, which loan is forbidden by law, the security is void, and cannot be the foundation of any action.

This was an action of covenant brought in the name of the state of Ohio against the executor of Joel Buttles, deceased, the facts of which sufficiently appear in the opinion of the court, which was delivered by Mr. Justice BATES.

On the 31st day of December, A. D. 1849, the Columbus Insurance company recieved of the commissioners of the canal fund one hundred thousand dollars of the money of the state, and executed and delivered to them the following instrument of writing:

"OFFICE OF THE COLUMBUS INSURANCE CO.,
"\$100,000. " COLUMBUS, OHIO, *December 31, 1849.*

"The Columbus Insurance Company hereby promises, for value received, to pay to the Ohio Canal Fund Commissioners one hundred thousand dollars, on the 28th day of December, 1851, at the office of the Ohio Life Insurance and Trust Company in the city of New York, or at such other place in the city of New York as said fund commissioners may direct, with interest thereon at the rate of seven per cent. per annum, payable semi-annually, on the first days of July and January, at the office of said Life Insurance and Trust Company in New York, or such other place in New York City as said commissioners may direct; said sum of one hundred thousand dollars being this day deposited with said Columbus Insurance Company, to be repaid as above; provided, that said Columbus Insurance Company shall have the privilege or right to pay the whole or any part of said \$100,000, at any time before or at the said 28th day of December, 1851, in seven per cent. stock of the state of Ohio at par."

(Then follows a warrant of attorney to confess judgment.)

"In witness whereof, the president and secretary of said company have hereunto set their hands and affixed the seal of the company, the day and year first above written.

"Attest,

E. F. DRAKE, *President.*

"(L. S.) D. ADAMS, *Secretary.*"

At the same time, in order to secure the payment of said \$100,000 and the interest thereon, according to the terms of the above contract, Joel Buttles and seven others entered into a covenant, binding themselves to pay the principal sum and interest, if the Columbus Insurance Company should fail to do so.

The insurance company having failed to pay any portion of the \$100,000 or interest, the state commenced this action against the defendant on the above mentioned covenant. 311

The declaration recites, that "on the 31st day of December, A. D. 1849, at the county aforesaid, the Board of Commissioners of the Canal Fund of the state of Ohio, with a view to the redemption of a portion of the seven per cent. stock of the state of Ohio, and to the increase and advancement of the canal fund, at the instance and request of Joel Buttles, now deceased, and of Elias F. Drake and others, naming the obligors in the covenant, deposited with the Columbus Insurance Company the sum of one hundred thousand dollars of the money and funds of the state of Ohio, to be transmitted by the said Columbus Insurance Company to the city of New York, and then to be paid to said fund commissioners in money, or in seven per cent. stock of the state of Ohio at par. In consideration of which deposit, the said Columbus Insurance Company, then and there made and delivered to the said Board of Commissioners of the Canal Fund of the state of Ohio, the certain writing obligatory," etc. The contract of the Insurance Company and the covenant of Buttles and others are then substantially set out, and it is assigned for a breach, that

neither the insurance company, nor Buttles, in his lifetime, nor his executor since his death, has paid said sum, or interest, or any part thereof."

The defendant having cravedoyer of the covenants, and set them out literally, demurred generally to the declaration.

The following questions are presented for decision, and have been elaborately argued:

I. Is the legal effect of the contract with the insurance company a deposit of \$100,000 to be transmitted to New York, or is it a loan of money?

II. If it is a deposit, had the insurance company authority to receive such a deposit? And,

III. If it is a loan, had the Commissioners of the Canal Fund any power or authority to make such loan?

When a party having a sum of money confides it to another, who is to return to him, not the same money, but a like sum, when demanded, the transaction is a deposit, as that term is ordinarily understood in commercial language. It is not a technical bailment. It creates simply the
312 relation of debtor and creditor. The creditor having the right at any time to withdraw the whole or any part of the fund, it is said to be *in the nature* of a gratuitous loan.*

Whenever the transaction embraces any other terms or conditions, it ceases to be a simple deposit. If the fund cannot be withdrawn at the will of the creditor, but is to remain for a certain period, it becomes a gratuitous loan. If it is to be repaid with interest, it becomes a loan upon interest.

A writing which acknowledges that a sum of money has been deposited by a party and that it is subject to his order, is evidence of a present liability to pay the amount specified, or in other words, is a certificate of deposit. If, however, it acknowledges that a sum of money has been deposited, and that it is payable to order or bearer, at a future day, with interest, these conditions destroy its character as a certificate of deposit, and it becomes in legal effect a negotiable promissory note; and its terms show that the consideration is money loaned.†

The reason of this distinction is obvious. In the case of a simple deposit of money, to be repaid in kind, the person receiving it may use the fund and derive profit from it, but that is not the object of the transaction. The owner deposits his money for his own convenience and safety, and it is no part of his object to confer a benefit or enable the other party to use it.

When money is deposited, and it cannot be withdrawn until the expiration of a certain period, the object of the parties is to enable the person receiving it, to use the money for such period. If it is to be returned at the specified time with interest, the object of one is to obtain the use of the money, and of the other to derive a profit by the deposit. In each case, it is clearly a loan of money. One is a gratuitous loan, the other is not.

The contract between the commissioners and the insurance company contains all the ingredients of a promissory note, and would be

* Story on Bailments, sections 848, 439; *Commercial Bank of Albany v. Hughes*, 17 Wendell, 100; Bouvier's Law Dictionary, title Deposit.

† Chitty on Bills, 525; *Bank of Orleans v. Morrill*, 2 Hill, 295; *Leavitt v. Palmer*, 3 Comstock, 35.

regarded as a single bill or promissory note under seal, if the right to pay in stock was not reserved.†

There is nothing in it indicating that it was a deposit of money, and to be transported to New York, except the recital—"said sum of \$100,000 being this day deposited with said Columbus Insurance Company, to be repaid as above," and that it is payable in New York City.

That recital clearly shows how the debt originated. Independent of it, it does not appear what was the consideration of the undertaking on the part of the insurance company. It clearly shows that, and it could not have been intended for any other purpose. The same clause attached to a promissory note would not destroy its character as commercial paper, or affect its negotiability. It would simply show that the consideration of the note was money, and not goods or other valuable thing. 313

The Southern Loan Company v. Morris, 2 Barr, 175, was an action upon the following instrument :

"The Philadelphia Loan company promises to pay R. Morris, or order, \$1,000, three months after date; being a deposit made by him with the Company, bearing interest at the rate of — per cent. per annum, payable at the office of the company.

"T. MOORE, *Cashier*.

GEO. S. SCHOTE, *President*."

The second section of the charter of the loan company prohibited the corporation from issuing notes or bills of credit, or promissory notes in the nature of bank notes; and in relation to this the court say: "These plain directions have been unceremoniously set aside by the issue of instruments, which, in their ostensible character and effect, are as plain promissory notes as it is possible to make them; being promises in consideration of money, payable to order, at a certain time, and thus negotiated and put in circulation as promissory notes."

On the 31st of December, 1849, the state had in its treasury a sum of money, which was by law appropriated to the payment of a part of the state debt, redeemable on the 1st January, 1852. The commissioners, in order that it might accumulate and not be idle in the treasury for the period of two years, deposited \$100,000 of it with the Columbus Insurance company, which company agreed to refund it with interest in the city of New York, in money or stock, on or before the 28th of December, 1851. Nothing can be clearer than that this contract is evidence of a loan of money. Its terms exclude any other hypothesis.

The contract being a loan, it is unnecessary to consider the second proposition.

Had the commissioners of the canal fund power or authority to make such loan?

The state can only act through its agents. The authority of such agents is necessarily prescribed by law, and is limited. When authorized to accomplish a given object, the means necessary for that purpose, if not prescribed, are implied. If the agent is indiscreet in the selection of means, the state ought not to be prejudiced thereby. If, however, the means are extraordinary, and such as to render it obvious that the object to be accomplished is a mere incident to the means used, the authority thus assumed is not sanctioned by law or public policy. 314

† *Bank of St. Clairsville v. Smith*, 5 Ohio R., 222.

By the act of 1825, Swan's Statutes, 744, the commissioners are required to "superintend and manage the canal fund, and receive, arrange, and manage to the best advantage, all things belonging thereto." The same section contains the following clause: "And generally the commissioners of the canal fund shall have power to make all such arrangements relative to obtaining loans and the payment of interest thereon, the transfer, transmission and deposit of moneys, as they may deem conducive to the public interest."

In 1843 the same powers were conferred upon a new board.*

By the act of March 13, 1843,† the commissioners were empowered to sell an amount of seven per cent. stock in New York, redeemable there, after the year 1851. It provides also for the collection of the surplus fund, and it appropriates that fund and other revenues to the redemption of the stock so sold.

It is admitted that the commissioners, in 1849, were not expressly authorized to loan the money of the state. It is incident to any of the powers conferred. In order to transmit the funds to New York, it was necessary to employ some agency, and the terms of the law of 1825 confer as great a latitude of discretion in the accomplishment of that object as could well be given. This discretion, however, has its limits, and only "includes the usual and appropriate means to accomplish the end.‡ It must be exercised in a reasonable manner, and cannot be resorted to in order to justify acts, which the principal could not be presumed to intend, or which would defeat and not promote the apparent end or purpose for which the power was given."§

The authority to make the contract rests upon the ground that the stock was redeemable in New York, and as the funds must be transmitted to that place, the commissioners, in order to transmit them, had authority in 315 their discretion to make a loan, payable in that city. The power to transmit funds from one place to another is distinct from and has no connection with a power to loan. The latter cannot be regarded as an incident of the former; on the contrary, it is a far greater and much more important power. It is so important and implies such hazards, that it cannot be considered as conferred upon the agents of the state, unless by the express terms of a statute, or as the ordinary means of accomplishing some required object. No such power is conferred by these statutes.

An individual may ratify the unauthorized act of his agent. It is not void but voidable. The state, however, being a body politic, capable of acting only through its agents, cannot make a contract except in pursuance of some law, and for the evident reason that there is no person having capacity to make or accept it. A contract with the state which is unauthorized by law, is wholly void.*

Were there any doubt as to the want of power on the part of the commissioners to make this contract, under the laws referred to, it would be entirely removed by the act of March 2d, 1846, Curwen's Revised Statutes, chap. 700, which was in full force when the contract was made.

* 41 Ohio Laws, 54; secs. 1, 10; Curwen's Revised Statutes, 953.

† 41 Ohio Laws, 80; sec. 17. Curwen's Revised Statutes, 977.

‡ 2 Kent's Com., 790, 7th ed.

§ Story on Agency, sec. 83, 4th ed.

*1 Leigh, 485; 6 Blackford, 91; 1 Iredell, N. C., 597; *United States v. Tingey* 5 Peters, 115, 128; *United States v. Bradley*, 10 Peters, 343, 359.

The legislature, apprehending that officers might use the funds of the state for improper purposes, and endanger their safety, provided in the 2d section of that act as follows :

"No such officer, agent or servant, shall loan out, with or without interest, any money or valuable security received by him, or which may be in his possession or keeping, or over which he may have supervision, care or control, by virtue of his office, agency or service." The section then provides a penalty for its violation.

The plaintiff, to avoid the effect of this statute, relies upon the case of *Harris v. Runnels*, 12 Howard, 79, as modifying what has heretofore been considered a well established and universal principle, *that a contract which is expressly prohibited by statute is void*.

Most of the cases upon this subject arise upon contracts which are forbidden by implication. That is, a law forbids or enjoins certain acts, and a contract is made, the consideration of which involves a violation of the statute; such contract is held void or binding, according to the intention of the legislature. If the law have in view merely the increase of the revenue, the contract is enforced; if it have in view the protection of the public, the contract is held to be void. A law requiring every practicing attorney to pay into the treasury a certain sum annually, and presenting a pecuniary penalty in case of his refusal or neglect, would not a void his contracts for services, if such sum was not paid. A law, however, requiring every attorney to be examined and admitted 316 each year by the supreme court, would be designed to protect the public against the evils resulting from the practice of incompetent persons, and therefore a contract for services by a person who had not complied with such a law, would be void. This distinction, it is believed, runs through all the cases, and if it had been appreciated by the court, in the case referred to, the discrepancies complained of would have been much less apparent.

There is a wide distinction between an express and an implied prohibition. It is believed that no contract was ever held valid and binding, the making of which was expressly prohibited by law. The question in the case of *Harris v. Runnels*, was whether a law of Mississippi prohibited the contract by implication; and it does not affect the principle applicable to express prohibitions, in the least degree. That court would hardly interfere with so sound and well established a principle. To hold a contract binding which is expressly prohibited by law, would be to enforce that which the legislature has forbidden; to give effect to that which the legislature has declared void. It would be, in effect, the repeal of a law by judicial construction.

The statute referred to, was intended to protect the funds of the state, by securing them against the risks necessarily incurred by every loan; and to declare this contract valid, would deprive the law of much of its force, and take away the safeguards which the legislature has thrown around the public treasury.

The demurrer is sustained.

Messrs. T. Ewing, H. H. Hunter and G. E. Pugh, for the state.

Messrs. E. Lane, Swan & Andrews, and P. B. Wilcox, for the defense.

324

PROMISSORY NOTES.

[In the District Court of Ohio, Fifth Circuit, Hamilton County, Special Term November, 1852.]

Before Mr. Chief Justice Caldwell, and Messrs. Justices Matthews, Carter and Woodruff.

COLVILLE V. GILBERT.

Evidence against an indorser—Construction of the law of evidence, Curwen's Revised Statutes, chapter 975—"Immediate benefit."

In an action by the payee of a promissory note against the indorser, though the defendant is a surety merely, the note is competent evidence against him to support any of the common money counts in assumpsit.

A creditor with whom his debtor has left claims for collection to apply the proceeds to the liquidation of the debt, having no other security for its
325 payment, is not a person for whose "*immediate benefit*" the suit on said claims is prosecuted, and is a competent witness for the plaintiff.

This was an action in assumpsit upon three promissory notes, made by Worthington & Colville, to the order of Gilbert, and signed by William Colville, upon the back thereof, at the time of their execution. The consideration for the notes passed from Gilbert to Worthington & Colville alone; William Colville becoming party to the notes simply for the accommodation of Worthington & Colville, and as security for them. The deposition of Jacob Gilbert was read in evidence by the plaintiff below, in support of the action; who testified among other things, that the notes in the suit belonged to the plaintiff below, his brother, who, on leaving for California, had left them with the witness for collection, and to apply the proceeds to his credit on account of a sum of money lent by the witness to the plaintiff below, and that the witness had no security for the indebtedness.

Judge MATTHEWS, in delivering the opinion of the court, held,

First—That the notes, notwithstanding the fact that the defendant was a surety merely, were competent evidence against him to support any of the common money counts in assumpsit.

Second—That Jacob Gilbert was not a person for whose *immediate benefit* the suit was prosecuted, and was not therefore incompetent as a witness in behalf of the plaintiff, under the act to improve the law of evidence.

Judgment affirmed.

Messrs. Smith, Corwine & Holt, for Plaintiffs in Error.

Mr. E. Mills, for Defendant in Error.

INDICTMENT FOR SELLING SPIRITUOUS LIQUORS. 328

[In the Gallia, Ohio, Court of Common Pleas, October Term, 1852.]

Before Mr. Justice Nash.

THE STATE OF OHIO v. S. H. DECKER.

Criminal law—Irregularity—Motion to quash—Construction of the words "vend or sell," in the liquor law—"Caption" defined—Surplusage.

A defendant in a criminal case is never allowed to withdraw his plea of not guilty, for the purpose of moving to quash the indictment for irregularity. If such irregularity exist, it may be taken advantage of on motion to arrest the judgment.

The statute of March 3, 1831, which makes it penal for any person to "vend or sell any spirituous liquors of any kind whatever, to be drank in the place where sold, without being duly licensed," etc., reaches every transaction whereby one person lets another have liquor under such circumstances as satisfies the jury that the seller expected to be paid for it. It matters not under what name or device the thing is done, whether a stick of candy, or a cigar, or lemon syrup, or anything else was nominally sold, and the liquor given in, so that it is clear that the seller got pay for his liquor under another name.

The act of March 12, 1851, Curwen's Revised Statutes, chap. 1073, has not changed this provision of the law of March 3, 1831.

The word "caption," as used in the text-books, with reference to indictment, defined.

- Surplusage, in an indictment, is such an averment as may be stricken out and yet leave a sufficient description of the offense.

The defendant was indicted for selling spirituous liquor to one Robert Chapman, at his shop in Gallipolis, to be drank at said place. There were two counts in the indictment; one charging that he did vend and sell certain spirituous liquor, etc.; and the other averred a sale with intent to avoid the provision of the act, etc. The defendant on being arraigned had pleaded not guilty, and now, when the case was called on for trial.

Mr. Cushing, for Defendant, asked leave for defendant to withdraw his plea of not guilty, in order to enable him to make a motion to quash.

Mr. Perry, Prosecuting Attorney, objected.

NASH, J. A defendant is never allowed to withdraw his plea of not guilty for the purpose of making a motion to quash for irregularity; and any other objections which go to impeach the indictment itself, may be taken advantage of by motion in arrest. This has been the universal practice in Ohio, and is sustained by authority. In *The State v. Burlingham*, 15 Maine R., 104; 3 Shepley R., 104, the court say: "As to the motion to go into the inquiry respecting the manner of finding the indictment, we think the motion came too late after the defendant had pleaded not guilty."*

The trial was ordered to be proceeded in, and the jury was impanelled.

The state called George Enyard as a witness; he testified that Robert Chapman got liquor of defendant, and he and Chapman drank it

* *Vide*, also Lowe's case, 4 Greenleaf R., 439.

in defendant's shop; that Chapman did not call for liquor, but for lemon syrup; that defendant set out the bottle of lemon syrup and spirituous liquor at the same time and without anything more being said by Chapman, and that he and Chapman drank the liquor and syrup together. He further stated that defendant was in the habit of doing the same thing, whenever lemon syrup was called for, and taking the usual pay of five and ten cents.

Mr. Cushing, declining to argue the facts to the jury, claimed to the court that here was a giving away, and not a sale, and therefore the defendant could not be convicted under this indictment, which was for a sale.

Mr. Perry, Prosecuting Attorney, claimed that this was a sale, and had always been so considered.

NASH, J. By the act of March 3, 1831, Swan's Statutes, 900, sec. 14, it is declared indictable for any person to *vend or sell* any spirituous liquor, etc. This statute has been repeatedly before the courts, and has been as repeatedly construed, and held to reach any transaction whereby one person let another have liquor under such circumstances as satisfied the jury that the seller expected to be paid for it, and that it mattered not under what name or device the thing was done, whether a stick of candy, a cigar, or lemon syrup, or anything else was nominally sold and the liquor given in, so it was clear that the vendor got pay for his liquor under another name. The construction heretofore given to the act of 1831 was broad enough to embrace all sales, whether direct or indirect, whether disguised or undisguised, whether in name given away, while indirectly paid for under another name, or sold openly. It was held that here was still a sale, substantially a sale, though in a vain effort to avoid the penalty of the law, it was covered up under the name of a gift.

330 The present act, Curwen's Revised Statutes, chapter 1073, after using the words *vend or sell*, adds *or give away with the intent to avoid this act*. It is claimed that these words create a new offense, and that the present comes within it. What was meant by the addition of these words, and what construction ought to be given to them, is a matter of some uncertainty. The words, *vend or sell*, must receive the same construction here as under the former act; and these latter words, if they are to have a substantive meaning attached to them, must be so construed as to embrace some act not coming within the purview of the preceding words, *vend or sell*; these words have been construed to embrace what the parties called a gift, when it was plain that the calling it so was a mere subterfuge to avoid the penalty of the law; while in reality both vender and vendee understood that the liquor was really the thing bought and sold. Such being the recognized construction of the words, *vend and sell*, what is there for the latter words to operate upon? They cannot refer to these sham gifts, to efforts by indirection to escape from the provisions of the act, because these cases are covered by the words *vend and sell*. What then is a giving away with intent to avoid the statute? A gift is a gratuity; it is the transfer of property from one to another without any consideration received, or to be received, or expected to be received. If the giver indirectly receives or is to receive a consideration for the pretended gift, then it is a sale, and not a gift, not a gratuity. Hence, if these words are to be construed as enlarging the scope of the act of 1831, they must be held to refer to a gift strictly so called, and

that must be a gift made with the intention of avoiding the provisions of this act. It is hardly possible to conceive of such a gift, unless we hold that the object of the statute is to put down shops for dram drinking, and then *imagine*, what is not *supposable*, that some person might be found, who should set up a shop for dram drinking, and, out of spite to this restraining law, should *bona fide* give his liquor to be drank there to all who should call for it. It will be time enough, however, to decide this question, whenever an indictment is so framed as to enable the state to claim a conviction in the case of a gift; the present indictment is for a sale.

The probability is that the drafter of this act did not design to extend the words of the prior act, as they had been expounded; but simply to declare in the law itself that the construction was right; that pretended gifts, which were in reality actual sales, were just as much within the scope of the law as professed sales. If such was the intent of the drafter and is the meaning of the words, then the present act is not different from the prior one; and an indictment for vending and selling will reach all the cases that can occur. That such was the design of the drafter may be clearly inferred from the subsequent part of the section. When he comes to declare the penalty, the act says, that for the *first offense* above named, the person shall be punished, etc. Here these words vend, sell or give away, etc., are referred to as describing only *one offense*, and not two offenses. This language is inconsistent with the notion that the drafter intended to make two offenses, one for vending or selling, and one for giving away with intent to avoid the statute. On this view of the statute, these latter words must refer to cases, which though gifts in name, are at bottom and reality sales, and hence add nothing to the extent of the former words, vend or sell; and hence an indictment for vending and selling will cover all gifts made with an intent to avoid the acts, because all such gifts must be in reality sales, whatever they may be in pretense. 331

The present is, however, a case for vending and selling; and in conformity with the above views of the law, the court will charge the jury, that if the jury shall find that Robert Chapman called for lemon syrup, and that, when he did so call, the defendant understood that he, Chapman, wanted the spirituous liquor as well as the syrup, and that defendant set out as well the liquor as the lemon syrup, and that said Chapman and witness drank of both and paid five or ten cents, then that this state of fact did constitute a sale of the spirituous liquor within the meaning of the law, and would justify the jury in finding the defendant guilty of a selling, the offense for which he is here indicted.

Jury returned a verdict of guilty.

Mr. Cushing, for Defendant, thereupon filed a motion in arrest of judgment, showing for reason that the caption to the indictment states the indictment to have been found at the October term, 1851, while the indictment charges the offense to have been committed in September, 1852.

This heading or caption was in these words:

"*The State of Ohio Gallia County, ss.*—Court of Common Pleas, of its October term, in the year one thousand eight hundred and fifty-one."

The indictment was actually found at the October term, 1852, and charges the sale to have been in September previous.

332 *Mr. Cushing*, for Defendant, insisted that a *caption* must be true, and if it states that the indictment was found at a term previous to the time alleged for the commission of the offense, no judgment could be rendered. He cited Starkie and Chitty's Criminal Law.

NASH, J. There is no doubt as to the correctness of the rule cited from Starkie's and Chitty's Criminal Law. If the caption to an indictment show it to have been found at a term prior to the day on which the crime or offense is alleged to have been committed, no judgment can be rendered on such a record; a record which shows on its face that the party could not have been guilty of the crime or offense charged, at the time the indictment was found.

Such is also the result of the cases in the United States. *Tipton v. State*, Peck, 165; *State v. Fields*, Peck, 140; *The State v. Hunter*, Peck, 166; *State v. Williams*, 2 McCord, 301; *Grandison v. The State*, 2 Humphrey's R., 451; *Mahan v. State*, 10 Ohio R., 233.

But do these authorities, and the counsel in this case, by the word *caption* mean the same thing? If they do not, then these authorities have no bearing upon the question now presented.

Now the word *caption*, as used in these authorities, means not such a memorandum as this at the head of this indictment, but the caption with which the clerk prefaces the indictment, on making up the complete record in the case. This caption, which is made up by the clerk from the records or minutes of the court, must show the holding of the court, the time of the same, the impanneling of a grand jury, the appointment of a foreman, the administering of the oath, and the finding of the indictment by the grand jurors thus impaneled and sworn. This statement is necessary to show that a legal indictment has been presented against the party, and to which he is by law compelled to answer. The memorandum here objected to is no caption in this sense of the word, and hence these authorities have no bearing upon the question here presented.

This memorandum is, then, no caption. Is it any part of the indictment? The indictment contains the finding of the grand jury; but this memorandum is clearly no part of this finding; and so are the authorities. In *The State v. Hopkins and Others*, 7 Black R., 494, it was held that this heading or memorandum constituted no part of the indictment; and, hence, that an indictment in which the year was alleged as the year aforesaid, and no year was named in the indictment, unless the year named in this heading could be referred to, was held to be fatally defective, because the grand jury could not refer to a date which constituted no part of their finding, no part of the indictment. The 333 same doctrine is laid down and followed in *The State v. Gilbert*, 13 Vermont R., 647. So also in *Missouri v. Cook*, 1 Missouri R., 547, it was held that the place where the offense was committed must be charged in the body of the indictment; it is not sufficient to charge it in the margin only. These cases clearly show that this memorandum in the margin, or these words preceding the finding of the grand jury, is no part of that finding, is no part of the indictment; and hence, whatever it may be, it cannot affect the indictment actually presented by the grand jury; the sufficiency of that must be tested by what appears in the indictment itself.

Since the memorandum constitutes neither a part of the caption, nor of the indictment, what is its character? Is it necessary? I think not. It is no evidence of the fact stated in it, these facts of the county, and

the court in which, and the term at which the indictment was found, must appear from the minutes of the court, and cannot be proved in any other way. The omission to record the finding cannot be supplied by any other evidence. *Commonwealth v. Caywood*, 2 Virginia Cases, 527 ; 2 Virginia Cases, 3 ; 2 V. C., 483. This memorandum, then, is wholly unnecessary; the facts stated in it must appear in the minutes of the court, and if not stated there, this is no evidence of them. Nor would it seem necessary to preface the finding of the grand jury by the words usually inserted in our practice. It would appear to be enough to say, *The grand jurors aforesaid, on their oath aforesaid, do find and present*, etc. The name of the state and of the county, and of the jurors, and of their impannelling and being sworn, all appear in the records of the court, and those records are the only competent evidence of these facts; their omission in the records of the court cannot be supplied by this recital prefatory to the finding of the grand jury. So when the indorsement, *A true bill*, was signed without the addition of the word *Foreman*, it was held sufficient as the records of the court show that the person, whose name was so signed was the foreman of the grand jury. *Commonwealth v. Read*, Thatcher's Criminal Cases, 180. So it was held sufficient, if it appeared on the face of the indictment that it was found "by the grand jurors of the commonwealth on their oath." *Commonwealth v. Johnson*, Thatcher's Criminal Cases, 284. The word aforesaid would indentify the grand jury finding the indictment as the one shown by the record to have been impannelled, and that the finding was upon the oath, which the record showed had been administered to them. The authority, by and the name in which the county for which, and the court in which, with the term at which the indictment was presented, would all appear in the minutes of the court, and in the complete record would precede the bringing in of the indictment; so that the words, *the grand jurors aforesaid, on their oath aforesaid*, would seem to make the record and indictment certain to every possible intent. Without, however, undertaking to decide how far these introductory words are necessary, it would seem on principle that there could be no necessity for reciting facts already appearing in the record, and when, too, that recital would be no evidence of the facts so recited, in the absence of those facts being evidenced by the records of the court. But that this memorandum is wholly unnecessary is perfectly clear, and that it might have been omitted without prejudice to the indictment, the record or the proceedings. 334

But does its presence here vitiate these proceedings? Here is a good indictment, regularly presented, as appears by the records of this court, and as will appear from the complete record when made up. Can, then, this false memorandum, a memorandum constituting no part of the indictment, no part of the record, no evidence even that the indictment was found at the October term, 1851, vitiate these proceedings, which the record shows to have been correct; that this indictment was found at the October term, 1852, and not at the October term, 1851? Now it is a general rule in criminal prosecutions, as well as in civil actions, that surplusage will never vitiate, *United States v. Howard*, 3 Sumner, 12; *The State v. Nolbe*, 15 Maine R., 476; 3 Shepley, 476, S. C.; *Rickets v. Solway*, 2 Barnewell & Alderson, 360; 4 Pickering's R., 252; 10 Pickering, 37; 3 Starkie's Evidence, 1534. Surplusage is such an averment as may be stricken out, and yet leave a sufficient description of the crime or offense. This memorandum may be stricken out without affecting the proceedings in this case; and if surplusage does not vitiate an indictment, can it

vitate a record? Can it be used to contradict or render doubtful a fact duly evidenced by the record itself? I, therefore, can see nothing in this memorandum which should prevent me from pronouncing the judgment which the law appoints for the offense of which the defendant stands convicted.

He was accordingly sentenced.

337

RAILROAD LAW.

[In the Court of Common Pleas, Highland County, Ohio.]

IN CHANCERY.

WILLIAM H. BALDWIN, COMPLAINANT, v. THE HILLSBOROUGH AND CINCINNATI RAILROAD COMPANY, JAMES M. TRIMBLE, DANIEL J. FALLIS, AND BENJAMIN BARRERE, DEFENDANTS.

Deviations from the route—Lateral roads—Power of directors to locate and change location of road—Acceptance of amendments to charter—Chancery jurisdiction—Injunctions to prevent abuse of corporate powers—Parties—A part suing in behalf of many.

Courts of equity permit one or more, having an interest identical with others, to sue in their behalf, for the accomplishment of a purpose common to all.

Where it is clearly shown that a corporation is about to exceed its powers, and to apply its funds or credits to some object or purpose beyond and without the scope of the authority conferred by its charter, the right of a court of equity to interpose by injunction on behalf of a corporator, is well settled. To justify such interference, there must be a clear violation of the rights of the corporator. When acts which require judgment, science and professional skill, are confided to the discretion of the officers of a corporation, the exercise of that discretion will not be lightly disturbed. Either a gross abuse of discretion, or the exercise of a power not conferred, must be shown.

An injunction will not be granted, at the suit of a corporator, to restrain the directors from exercising discretionary powers, in which innocent third persons have acquired an interest which will be greatly prejudiced by such an injunction, where the corporator has, by his vote or acquiescence, admitted the existence of such discretionary power in the directors.

There can be no conditional or partial acceptance of a charter, or of the amendment of a charter. The grant, when accepted, is put upon the footing of a contract, which, being an entire thing, must be accepted or rejected altogether.

The power of the majority of the corporators to accept an amendment of the charter is unquestioned. But Mr. Justice GREEN doubted the right of a majority of the corporators to accept an amendment which changes the nature or original design of the association; but as that point did not arise in this case, it was not decided.

338 A corporation is bound, in the same manner as an individual is, to third persons, who have dealt with the accredited agents of the corporation in good faith, and in ignorance of the want of authority of the agent, when that authority depends on the proceedings of the stockholders or directors, and they have silently acquiesced in its exercise by the agent.

Where the termini only of a railroad are fixed by the charter, a discretion to locate the road by any route that will connect those points is of course given; and if liberty be given by the charter to construct a lateral road from the main line to an intermediate point, it will not prevent the company from locating the main line through that point.

In this case an injunction having been granted on the 27th of January, 1853, by one of the judges of the court of common pleas, on the pre-

sentation of the bill, without notice or hearing, the defendants filed their answers, and made a motion to dissolve the injunction at the next term of the court of common pleas, sitting at Hillsborough, in the county of Highland, which was heard on the 22d, 23d and 24th days of February, 1853. The argument in favor of the motion was conducted by Messrs. C. B. Goddard, of Zanesville, William Y. Gholson, of Cincinnati, and James H. Thompson, of Hillsborough; and in support of the injunction by Messrs. Alphonso Taft, of Cincinnati, and the complainant, William H. Baldwin, of Blanchester.

The decision of the Hon. JOHN L. GREEN, of Chillicothe, the judge presiding, was given on the 28th of February, 1853, and it having been agreed that the case should be considered as on final hearing, there was a decree in favor of the defendants, that the injunction should be dissolved, and the bill dismissed. The facts of the case, and the points involved, sufficiently appear in the opinion of the court.

Mr. Justice GREEN delivered the opinion of the court.

The bill is filed by complainant, on behalf of himself and other stockholders to restrain the company, and the defendants, Trimble, Fallis, and Barrere, acting directors, from further proceeding under an act of the general assembly of Ohio, passed March 12, 1851, authorizing the extension of the company's road from Hillsborough to Marietta, in the county of Washington.

The defendants having answered, moved to dissolve the injunction.

Before proceeding to the hearing of this motion, the counsel for complainant moved for leave to file the petition of Calvin P. Baldwin, who holds ten shares of stock, by assignment, praying to be made a party complainant; and it was agreed that this application should be disposed of upon the determination of the motion to dissolve.

The bill, answers, exhibits and affidavits cover some hundred pages. The facts, however, are sufficiently presented in the opinion of the court for a proper understanding of the points decided. 339

First, then, as to the application for leave to file the petition of Calvin P. Baldwin to be made a party complainant.

The rule is, that when the grievance complained of is common to a body of persons too numerous to be all made parties complainants, the court will permit one or more of them to sue on behalf of all; subject, however, to this restriction, that the relief which is prayed for must be one in which the parties, whom the complainant proposes to represent, have all of them an interest identical with his own.* And it has been held that separate suits will not be permitted by several in their individual characters, for a purpose common to all.†

The party who asks permission to file this petition claims to have an equity identical with that of the complainant. If so, his rights will be sufficiently represented by the original bill. The design, however, in obtaining the leave asked, is evidently to avoid the effect of certain acts of the complainant, which, as it is claimed, operate as a bar to the interposition of this court in his behalf. In other words, to present a different case from that made in the bill. Without considering how I should have regarded the bill had both these parties appeared as complainants, seeking the same relief, but upon distinct and different grounds, it is sufficient to say, that I think the defendants have a right, for obvious

*Story's Equity Pleadings, sec. 113

Mozley v. Alston, 19 English Chancery R., 798.

reasons, to be heard on their motion to dissolve this injunction upon the case as made by the bill of the complainant. If the injunction shall be continued, the object of the petitioner is attained; if otherwise, and he can make a proper case, he cannot be prejudiced.

I shall, therefore, proceed to consider the case as made by the bill of complainant, the answers, exhibits and affidavits.

Several questions are presented which demand the most careful consideration; not more on account of the magnitude of the interests immediately to be affected by the decision than of their intrinsic importance. It has been said that this is an age of corporations; and whatever may be the benefits conferred upon community by the aggregation of the vast wealth employed in public improvements, such as railroads and the like, we must not lose sight of the fact, that such and so great are the powers vested in, and exercised by a few, the officers and agents of these associations, that the safety of individual rights imperiously demands of these courts the most watchful vigilance, in holding those
340 officers and agents strictly responsible for the just and lawful exercise of their powers. In this I fully concur.

Where it is clearly shown that a corporation is about to exceed its powers, and to apply its funds or credits to some object or purpose beyond, and without the scope of the authority conferred by its charter, the right of a court of equity to interpose, by injunction, on behalf of a corporator, I conceive to be well settled. Such acts, if carried out, would amount to a breach of trust; and trusts constitute one of the leading and most important branches of equity jurisdiction; and in the language of Lord Eldon, "a most wholesome exercise of the jurisdiction it is, because, great as the powers necessarily are to enable the companies to carry into effect works of this magnitude, it would be most prejudicial to the interests of all persons with whose property they interfere, if there was not a jurisdiction continually open, and ready to exercise its power to keep them within their legitimate limits."

Whilst, however, we may look with confidence for the prompt interposition of courts of equity to arrest these bodies in any attempt to exercise, illegally, their powers, or powers not conferred upon them, it must also be remembered that those courts are not left to the dictates of caprice, but act upon well settled rules, founded in principles of equal justice. And the cases which will justify its interference should be those of "clear, incontestible, well defined right." *

Keeping these principles in view, I proceed to examine the grounds upon which the complainant claims to have his injunction continued.

It is alleged that by an act of the general assembly of Ohio, passed March 12, 1851, amendatory to the company's charter, a fundamental change was proposed in the original design and object of the association. That this change could only become binding upon the corporation by the unanimous assent of the corporators, and that such assent has never been given by the complainant, and those stockholders on whose behalf he is acting.

The first section of the act referred to, provides as follows:

"That the Hillsborough and Cincinnati Railroad Company shall have power, and is hereby authorized to extend its road to the city of Marietta, and from thence to any point above the mouth of the Muskingum on the Ohio river, and to cross the same—to cross or join any

* Walker v. The Mad River and Lake Erie Railroad Company, 8 Ohio R., 38.

other road—to construct a branch to Greenfield, Frankfort and Circleville, or either of them, and any other branch or branches deemed necessary by the company; in all which cases the said company to enjoy all the privileges, and be limited by the restrictions contained in the original charter." 341

No one doubts that it is competent for a corporation to ask for, and the legislature to grant, new powers; and that such grant, when duly accepted, becomes a part of the charter; but the question raised is, how is such acceptance to be made, so as to be binding upon the individual corporators—by a majority, or the unanimous concurrence of all the stockholders? Upon a careful consideration, I have come to the conclusion, that in the case of joint stock associations, there being nothing in the articles of association, or in the charter that prescribes the mode of determining the question of acceptance of a grant of new powers from the legislature, and where such grant is in conformity with, and in aid of, the original objects of the association, a majority vote may govern; but, where the grant proposes a change in the nature or original design of the association, it must have the unanimous consent of all the shareholders before it can become binding upon the company.

However anti-republican the notion may seem to be, that the will of one shall control the action of a thousand, nevertheless there are cases in which upon its assertion depends the safety of that inestimable right which is guarantied to us, of acquiring, holding and enjoying property.

Parties, who have subscribed their money for one purpose, are not to be told that the directors, or a majority of the company are of opinion that it would be very advantageous to employ it for another. This principle is founded in the law of property, and must be sustained in virtue of the right which every citizen has to call upon the courts to *enforce* his contracts; not to make contracts for him.

In *Natusch v. Irwin* (see Appendix to Gow on Partnership, 593), Lord Eldon says: "The repeal of the act of George I, which merely made it lawful for societies or partners, however numerous their members might be, to insure against marine risks, could not make it lawful for companies or societies, which were formed for specific purposes of insurance upon lives and against fire, to insure against marine risks, unless the contracts by which such companies were formed, created an authority in some part of the body to bind all the body to the adoption of such new undertaking."

This doctrine is also recognized by Lord Brougham in the case of *Ware v. The Grand Junction Water Company*, 13 English Chancery R., 126, although some expressions used by him might seem not to be consistent with such a conclusion. I refer also to 6 English Law and Equity R., 132; 8 English Law and Equity R., 137; 4 Johnson's Chancery R., 139; 9 Wheaton, 738. This precise question has been so ruled in a recent case decided in Vermont, and reported in the January number (1853) of the *American Law Journal*. In regard to this last case, I must say, however, that although I concur with the chancellor in his conclusion, I do not arrive at it upon the authority of a numerous class of cases, which he cites, where suits have been instituted at law for the recovery of assessments upon subscriptions of stocks. In such cases, I apprehend, principles distinct and different from that we are discussing are to be considered. 342

The cases to which I am cited to sustain the right of the majority to rule, are cases where the change proposed did not affect the nature or

original design of the association, but went to some rule of organization as in the case of *The Commonwealth ex rel. Claghorn et al. v. Cullen et al.*, 13 Pennsylvania Statute R., 13, where the question was, whether the acceptance by the trustees of an act of the legislature changing the number of the trustees, and the times of holding elections, confirmed by a majority vote of the stockholders, was an acceptance by the corporation. So also of the case of *Currie's Administrator v. The Mutual Assurance Society*, 4 Hen. & Munf., 315.

Suppose this company should propose to embark its funds or credit in the business of insurance, speculating in real estate, or the like, would it not be competent for any stockholder, not assenting thereto, to restrain them by injunction? And this, though it had been authorized by a vote of nine hundred and ninety-nine out of the thousand. Assuredly; and the reason is obvious. The corporator has a right to hold the association to the business contemplated and agreed upon when it was formed. This is an inherent right, growing out of his contract, and an act of the legislature changing that contract, so as to confer upon the majority the power so to control the affairs of the company would not be enforced against his consent. The legislature has no power over private contracts, provided they be consistent with law and public policy. Where the change proposed, however, is in a matter of mere government, there is an implied agreement among the parties, as corporators, that the majority shall govern—for it is for the common good of all—but no such implied agreement exists in reference to individual property held under the contract; such contract being silent upon the subject. Any departure from this rule might lead to dangerous consequences, and go far in less-
343 ening the inducements to embarking in public enterprises of this character; as no one could be sure, upon entering into a useful and profitable enterprise, how soon a wild spirit of speculation might pervert the original designs to schemes of great hazard and ultimate ruin.

But is the complainant in a condition to avail himself of this rule? Let us inquire. It appears by the extracts from the records of the company, made exhibits in this cause, that on April 4, 1851, a meeting of the board of directors of the company was held, the complainant being a member of the board, and present, at which time, on motion of Mr. Price, seconded by Mr. Baldwin, the complainant, the following resolutions were adopted:

"Resolved by the Board of Directors of the Hillsborough and Cincinnati Railroad Company, That the act passed March 12, 1851, amendatory of the act entitled an act to incorporate the Hillsborough and Cincinnati Railroad company, be and the same is hereby accepted and adopted as part of the charter of said company from and after the passage of this resolution.

"Resolved, That said company will, so soon as funds can be procured for that purpose, locate and construct its road eastwardly to the boundary of the corporation of the city of Chillicothe, by the route known as the Paint creek route.

"Resolved, That C. D. Jaques, Esq., chief engineer of this company, receive from Elwood Morris, Esq., engineer, when ready for delivery, the surveys and estimates, and all books and papers connected with the line or lines located by said Morris, on said Paint Valley route from Hillsborough to Chillicothe.

"*Resolved*, That the subscriptions made and to be made to the capital stock of the Hillsborough and Cincinnati Railroad company, on condition that the said company's road from Hillsborough eastwardly to Chillicothe should be located and let for construction, on the main Paint Valley route, be and the same are hereby severally accepted; and said subscriptions, so made and to be made and conditioned as aforesaid, are hereby adopted as part of the capital stock of said company from and after the passage of this resolution.

"*Resolved*, That the line of the said Hillsborough and Cincinnati railroad along the valley of main Paint creek, shall be definitely located and let, so soon as the subscription conditioned for the construction of the said road along the valley of main Paint creek shall, in the judgment of the board, amount to a sum sufficient to authorize the commencement of the construction of said road."

Afterward, on May 8, 1851, at a general meeting of the stock-
holders assembled for the election of directors, the following resolu-
tions were adopted, at which meeting complainant was present, and voted
in the affirmative. 344

"*Resolved, by the Stockholders of the Hillsborough and Cincinnati Railroad Company*, That the decision of the board of directors of said company, at their meeting in Hillsborough, on the 4th of April, 1851, accepting and adopting as a part of the charter of said company, the act of the general assembly of Ohio, passed March 12, 1851, amendatory of the act entitled 'an act to incorporate the Hillsborough and Cincinnati Railroad company,' be, and the same is hereby approved and confirmed.

"*Resolved, further*, That the decision of said board at the meeting aforesaid, adopting the Paint Valley route for their line of road eastward from Hillsborough, and determining to locate and let the same so far as subscription should be made for such extension, whose amount should, in the judgment of the board, authorize such letting, meets with the approval of the stockholders here assembled, and they cordially approve the same."

Now, it seems to me that it would be difficult to conceive of a more full and complete acceptance of this amendatory act, than is to be found in these proceedings. The first resolve of the board is an unequivocal acceptance of the act. The second, third and fourth merely announce the mode in which the power of extending the road is to be exercised, all of which was approved by the stockholders.

But the complainant denies this conclusion. He insists that the resolves of the directors, approved by the stockholders, which declare the adoption of the Paint Valley line as the policy of the company, constituted *the condition* upon which the acceptance of the act of March 12, 1851, was predicated; and that, except as indicated by the above resolutions of May 8, 1851, which as he claims, limit and confine the extension of the road eastwardly from Hillsborough to the Paint Valley, "the stockholders have never, as a body, consented to the acceptance of said act; and that individually and collectively, they are not bound or liable to have said act imposed upon them without their consent, or against their will, or otherwise than upon such conditions as they may choose to annex regarding the mode and manner of its being into operation."

This view has been elaborately urged for the complainant, but he has failed to change my opinion of what appears to me to be the obvious

import and design of these resolutions. But suppose I am wrong in this construction, and that the adoption of the Paint Valley route was intended as a limitation or condition on which the acceptance of the act was to
345 depend, I apprehend that whatever may have been the intention, in legal effect, the acceptance was full and perfect for all purposes; and so, indeed, as I shall presently show, the complainant and others acting with him, have regarded it.

This idea of a conditional or partial acceptance of a charter, or the amendment of a charter, is not, in my opinion, founded in law. In support of the position, I am referred to Angel and Ames on Corporations, 71, where it is said, on the authority of Lord Mansfield, in *Rex v. Cambridge*, 3 Burrows, 1568: "But if a new charter be given to a corporation already created, there may be a partial acceptance of the second charter, and the body corporate may act partly under the one and partly under the other." It is true that Lord Mansfield used this language, but in looking into this case we find that the decision is based upon the construction given to several new charters granted to the University of Cambridge, which it was said could not be intended to overturn her ancient charters, which to do "the crown had not the power." It is admitted in the text that there can be no such thing as a partial acceptance of an *original* charter. This reason for the distinction taken between an original charter and new charters granted to a corporation already existing, is not to my mind very apparent. In either case the grant when accepted is put on the footing of a contract; and if this be right, it is difficult to understand how this contract, which is an entire thing, may be accepted in part and rejected in part by one party without the consent of the other. In *Rex v. Westwood*, 7 Bingham, 1; 20 Eng. Com. Law, R., 58, Lord Tenterden says: "Two questions of law, therefore, have arisen upon this record. The first, whether it is competent to an existing corporation, to whom a charter of the crown is offered, to accept the charter in part and reject it in part; or if accepted in part, whether that must not be taken as an acceptance of the whole? Upon that point there never has been any difference of opinion among the learned judges. There are indeed to be found some expressions in former times importing that a corporation might accept a part of a charter and reject the remainder, but of late all the judges have been of opinion that it is not open to a corporation—otherwise a corporation might reject the obligation which was imposed, and accept the benefit which was conferred upon them; and accordingly there was judgment in the court below for the crown upon that point, namely, that the allegation that the charter was accepted in part was a bad allegation."

This I hold to be the law; and I am therefore of opinion that here was an acceptance by the corporation with the assent of the complainant,
346 of the act of March 12th, 1851; and that said act, for all purposes, became a part of the charter of the company.

But it is claimed by the complainant that if there was a sufficient acceptance of the act in question, which binds him and those on whose behalf he acts, that the mode and manner in which the power conferred by it should be exercised was prescribed by the stockholders by the adoption of the Paint Valley line; and that the act of the directors in abandoning that line and in adopting another without the assent of the stockholders was beyond their authority, a usurpation of power, illegal and void.

Upon referring again to the extracts from the records of the company exhibited in the cause, we are furnished with a history of the doings of the board in reference to the extension of the road eastwardly from Hillsborough. Without giving a literal copy, it in substance presents the following facts :

That at a meeting of the directors held on July 23d, 1851, the Paint Valley route was repudiated and abandoned. That the name of Chilli-cothe was stricken out from the subscription papers, and a committee appointed to procure the assent of the subscribers thereto to the change. That another route was adopted, and a committee appointed to procure releases of the right of way on such new route. That at a meeting of the board held on September 4th, 1851, the executive committee of the board, of which complainant was one, were instructed to act in conjunction with the engineer in making the necessary surveys, to determine the shortest and most practicable route for the extension of the road from Hillsborough to Belpre, on the Ohio river. That a committee of stockholders was appointed to proceed to Baltimore to confer with the Baltimore and Ohio Railroad company and the Northwestern Virginia Railroad company upon the subject of this "proposed and long desired connection of the two great commercial cities, Cincinnati and Baltimore, and to bring about the connection of the three roads at Belpre, opposite Parkersburg." And finally, at a meeting of the board of directors, held 29th December, 1851, it was unanimously resolved, "that it was the settled policy of this company to extend their railroad eastwardly to Parkersburg, Virginia, at the earliest possible day." And it is further shown that upon all of these several occasions the complainant, being a director, was present, and voted in favor of all these resolves; and that at the meeting of the 29th December, being president of the board, he presided.

If the first resolution of the directors adopted on April 4th and ratified by the stockholders on May 8th, was not considered as a full and complete acceptance of the act of March 12, 1851, but was understood to be limited by the condition that the Paint Valley route should be adopted, how are we to account for the subsequent abandonment of that route and the adoption of another? Upon no other theory, I apprehend, than that, at that time, this idea of a conditional acceptance had not been matured. How, we may ask, do these facts square with that statement in the bill, in which complainant avers that "he hath not ever agreed to the extension by said company of its road eastwardly, except by the said resolutions (of 8th May, 1851), of said stockholders and said board of directors." The explanation is given in the affidavit of Doctor Spees, who, it seems, was himself a director all this time, and acted with complainant. 347

He swears that he too was a director of the company from May, 1849, to May, 1852—that he voted as a director at the meeting of the directors in April, and at the meeting of the stockholders in May for the acceptance of the act of March 12, 1851—with the express understanding that the Paint Valley line was to be adopted and no other. That that was the sole moving consideration for his agreeing to the acceptance of said act. That he voted for the resolutions of the 23d of July, 4th of September, and 29th December, above referred to. That he also voted to have said last named resolutions published in the newspapers. That he and complainant had frequent consultations; that they had acted upon these resolutions not with any real design or intention of departing

from the cherished plan of the Paint Valley route, but for the purpose of operating upon the fears of the people of Chillicothe, hoping thereby to stimulate them to take active steps in the matter of uniting the two companies at that place, and preventing the Marietta company from building their road west of Chillicothe; and with this view alone he and complainant assented to said resolutions.

It is, to say the least, a novelty to find a party coming into a court of equity, asking to be released from the consequence of his own acts upon the ground that they were not done in good faith, but intended to practice a fraud upon others. The legal proposition is, however, presented by the complainant, whether under the charter of this company, the directors, without the assent of the stockholders, obtained in a regular manner, have power to change the route and location of the road.

In looking into the original and various amendatory acts under which the company is acting, I find no provision which, in terms, confides this power of locating routes, and making changes therein, to the **348** board of directors. Neither is any such power conferred by any by-law or resolution adopted by the stockholders. Where, then, does it reside? Corporate powers are usually distinguished into legislative, electoral and administrative. In private corporations aggregate, though sometimes all the members act immediately in the administration of its affairs, usually, for the sake of convenience, the direct management is intrusted to certain officers or board of managers, elected by the members at large, though deriving their ordinary powers from the act of incorporation. These officers exercise the legislative and administrative functions. The former in the institution of by-laws for the general government of the company; the latter in the superintendence and execution of its general business. The power of making and changing locations is clearly administrative, and whether this power be conferred by the charter on the board of directors or not, must, from the necessity of the case, to some extent be lodged in them, otherwise, when a route is once adopted by the stockholders, no change, however trivial and however necessary, could be made without calling them together to consent to it. It by no means, however, follows that because from the necessity of the case the power must sometimes be exercised by the directors, they may assert it in all cases, and especially in making a change so radical as in the present instance; and I should be unwilling to allow such latitude of discretion to these agents in the absence of at least some implied authority on the part of the stockholders. Such implied authority may, I think, be fairly inferred from their acts in this case. It appears that the abandonment of the Paint Valley route by the board of directors was determined upon so far back as July, 1851; and the final announcement of the settled policy of the company to proceed to Parkersburg was made in December of same year. These facts were rendered notorious by publication in newspapers and otherwise, under the authority of the board. In May, 1852, a meeting of the stockholders was held for the purpose of electing the directors; at that time the record of the doings of the board of directors was before them, and a report of the condition of the finances and general business of the company was made to them. Notice has been published for months in various newspapers in Ohio, Boston, and elsewhere, that on a given day proposals would be received for the construction of the road by the line, via Picketon and Jackson, to Parkersburg; and contracts have been made for the

construction of the road in pursuance thereof. Is it not too late for the corporation now to question the authority of their agents to act in these matters? New rights have sprung up, growing out of the action of these agents, the stockholders having full knowledge of all that was doing, and standing silently by. This silence is a ratification of those acts. If a corporation ratify the unauthorized acts of its agents, the ratification is equivalent to a previous authority, as in the case of natural persons, Angel and Ames on Corporations, 304. Corporations may be affected by implications as individuals are, and where its action or *acquiescence* is the natural result or necessary accompaniment of some other supposed precedent fact, the existence of that fact will be assumed both for the purpose of charge and discharge. 13 Pennsylvania State R., 133. Acts done by a corporation which presuppose the existence of some other acts to make them legally operative, are presumptive proof of the latter. 11 Wheaton, 70. Acquiescence by a corporation in the unauthorized acts of their agents, will be deemed a ratification of those acts, and will bind the corporation. 5 Hill's New York R., 137; 16 Connecticut R., 388; 13 Ohio R., 300. 349

Now, I concede it may be doubtful whether, in a supposed controversy between them not involving other rights, it would be competent for these directors to say to the stockholders: "We have, it is true, been acting without authority, but you have acquiesced in it, and have, therefore, no right to complain." But here, although the complainant desires to place the question in that light, we cannot so exclusively consider it. To arrest the further prosecution of the work at this time would affect materially, it may be ruinously, the interests and rights of strangers, who have dealt with this corporation in good faith. It was impossible for them, not having access to the records of the company, to know the extent of the authority which might have been conferred upon the directors by the stockholders. They could only know that they, the directors, proposed to exercise it; that they gave notice to the world of such intention; that they have exercised it, and to all this the stockholders, having full knowledge, have made no objections.

If this corporation, then, could not set up the unauthorized conduct of their agents in this change of location of the road, it would seem to me to follow, as a consequence, that this complainant cannot make it a ground for arresting the action of the corporation, the consequence of which must be to involve the latter in a liability upon contracts, which could not, perhaps, have been obtained had the complainant seen proper to have asserted his rights and given notice to the public at the proper time. I come now to that branch of the case much relied upon by the complainant, and in relation to which I have had some difficulty. 350 It is insisted, that by the act of March 12th, 1851, the power of the company to extend their road eastwardly is defined and limited to the terminus at Marietta, or some point above on the Ohio river, and that they have no right to terminate at Parkersburg, in Virginia; and it is claimed that the evidence shows that there is a settled determination to do so.

It is admitted that the road has been let to Parkersburg, and the exhibits show that the directors have entered into a contract with the Baltimore and Ohio railroad company and the Northwestern Virginia railroad company, by which it is agreed that the Cincinnati and Hillsborough railroad company shall complete their road on a gauge uniform with that adopted by the first named companies to Parkersburg; that a

bridge is to be constructed across the Ohio river at that point, to connect the roads, and that said companies will agree upon such a system of through charges between Baltimore and Cincinnati, as shall give to the said roads the full benefit of through rates on the most favorable terms; the Northwestern Virginia railroad company agreeing to construct the lateral road and bridge across the Ohio, to connect with the Hillsborough road opposite Parkersburg, and the Hillsborough road pledging themselves to accede to any arrangements relative to depots or stopping places upon either side of the Ohio river, which may be thought necessary by the Northwestern railroad company, to protect and favor the right and interest of the town of Parkersburg.

On the part of the defendants, the affidavit of Elwood Morris, the chief engineer, is offered, who states, that from his acquaintance with southern Ohio, he is familiar with the various routes between Cincinnati and Marietta; that there are two lines, a northern, via Chillicothe, and southern, via Piketon; that he is satisfied that the route now adopted by the Hillsborough company is the best line that can be found from the town of Hillsborough to Marietta, in point of distance, grade and curvature, as well as cost; that the route now being surveyed from Hillsborough is the shortest and best route from that town to the city of Marietta; and that at the point branching off *to join* the Northwestern Virginia road, it is only necessary to continue directly forward to the city of Marietta by the valley of the Ohio river; that \$10,000 have been expended by the company in making surveys, etc., upon this route. The engineer then proceeds with his opinions as to the true policy of the
351 company in reference to an eastern connection, concluding that the proposed connection at Parkersburg is indispensable to save the Hillsborough company from ruin, etc.

Taking these facts together, it is clear that there is no intention on the part of those *now* having the control of the affairs of the Hillsborough company even to continue the road to Marietta, but that they have not put it out of the power of the company to do so at any future time; and that, according to the statement of the engineer, they are (at Parkersburg) on the shortest and best route to Marietta.

There are cases in the English books where these railway companies have been restrained in expending the funds in constructing a portion of their road, if it appears that their means are inadequate, or they indicate an intention not to construct the whole line from one point of terminus to another. This difficulty has, however, been removed by the passage of what is known as "The Railways Abandonment Act;" still, in that country the greatest strictness is required in adhering to the line of the road, and, there, it seems, that a company would be liable to a cesser of their powers by a substantial departure from the plan contemplated in the charter, as if they deviate the actual line into property not comprehended in their act, or change the terminus of their road from some large town or city to an obscure village. The same strictness observed in England, however, in granting these charters, has not characterized our legislation. There, it seems, the route of the proposed road, indicating, not only the points of terminus, but those lying between, and also the land of each individual through which it is to pass, is before parliament, and is incorporated into the act granting the charter. With us the point of beginning is sometimes deemed sufficient, as in the case of the Ohio Central railroad, which is authorized, I believe, to build a road from Columbus

east to any point on the Ohio river, and west to any point on the state line.

Whether in Ohio, the abandonment of part of the line of road contemplated by the charter would work a forfeiture of the franchise of a railway company, is not, however, the question to be decided in this case. The proposition here is, whether on the case made, the complainant is entitled to the aid of this court in restraining the defendants from proceeding in the construction of the road to Parkersburg; the intention of building it to Marietta, or any point above on the Ohio river, being abandoned by the company.

In considering this question, it will be proper to look to the policy of our legislation in Ohio upon the subject of these public improvements, and the objects contemplated by these parties in obtaining the grant of power in question, in order to determine whether upon principles of equity this court should further interpose to restrain these defendants. 352

As I have before remarked, the same strictness in regard to defining the route of these roads observed in England, has not been observed in Ohio. The internal trade or commerce of the state is limited. Her great staples find their market on the Atlantic seaboard. The business of her merchants, and a large class of her farmers, takes them there periodically. The position of the state (with reference to population, now about the center of the Union), attracts all the lines of communication between the west and east through her limits. A railway beginning at one point in Ohio and terminating at another, not having at either end a through connection with the Atlantic, or the Mississippi, or the country washed by the great northern lakes, would hold out little inducements for investments. Hence, with a view to encourage their undertaking, great liberality has been exercised by the legislature in the discretion given in making such connections as shall furnish the required facilities to markets, and thereby render the stock profitable.

What, then, was really the design of the company in obtaining and accepting the amendatory act of 1851? There cannot be a doubt that it was simply to secure a connection by railroad with an eastern market. To accomplish this, the legislature by the act in question, have, at their request, liberally afforded room for the exercise of a wide discretion. By it they are "authorized to extend their road to Marietta, and from thence to any point above the mouth of the Muskingum, on the Ohio river, and to cross the same." By this they are enabled to "join" any railroad at any point, at or above Marietta, which the policy of the Virginia legislature might permit to touch the Ohio river. They are further empowered "to cross or join any other road."

May it not be claimed that here is power to do what the defendants are now attempting to do? Why, it may be asked, is the power given "to join any other road," if it be not for the purpose of enabling this company to attain the main object they had in view, namely, an eastern market, by connecting themselves with any other road in Ohio, as well as out of it, tending in that direction, with which a suitable arrangement might be made? And was it not under this same grant of power "to join any other road" that the complainant was urging the construction of this road to Chillicothe, there "to join" a road that was about to be built to the Ohio river? Indeed, he does not claim that the construction of the road to Marietta was a matter of any moment to him, but it appears from his own show- 353

ing, that all the use he designed to make of the amendatory act was to obtain the power to construct the road to Chillicothe by way of Paint Valley, there to force a connection with the then Cincinnati and Belpre road, which, at that time, was directing all its energies to a connection with the city of Baltimore at Parkersburg, the same point which the defendants are now seeking to reach. Since that time, the last named company have changed their policy, and instead of stopping their road at Belpre, opposite Parkersburg, they have determined to go on to Marietta, and a connection between that road and the road of defendants, it is said, is not now probable.

Now, I repeat, the complainant does not pretend that the construction of the road to Marietta, or any point above on the Ohio river, is now or ever has been the controlling consideration with him or anybody else. He does not pretend that the design and object of himself and the other members of the association, in accepting the act of March 12th, 1851, was not in some way to procure a through line of communication with some of the eastern cities. He does not pretend that such a connection could be more profitably secured at Marietta than at Parkersburg. But he says, in effect, "I supposed, when I agreed to accept the amendatory act, that this purpose could be attained by uniting with another company at Chillicothe. That is now rendered impossible, and, therefore, this defendant must be restrained from proceeding at all."

I have in another place spoken of the legal effect of the proceedings of the complainant and others, in ratifying the action of the board of directors, accepting the amendatory act. If I am right in supposing it to be an unqualified acceptance of that act, the complainant and all others acting with him, have subjected themselves to the consequences of the power thus acquired by the corporation. It gave to the majority the right to act under, but in conformity to the spirit of the grant or not. If they should determine to act, a discretion was necessarily vested in determining how the best interests of the company might be served. And if the defendants are attempting to carry out the purpose for which the grant was accepted, it should be a clear case of gross abuse of that discretion that would authorize this court in arresting their further action.

354 In *Walker v. The Mad River and Lake Erie Railroad Company*, 8 Ohio R., 38, it was held that all incorporated companies for constructing roads or canals, are subject to legal control, in a proper case; yet chancery will not interpose such control in a controverted case of expediency of location. Judge LANE, in deciding the case, says: "That cases which justify the interference of a court of chancery, should be those of clear, incontestible right; when acts, requiring judgment, science, and professional skill, are confided to the discretion of the officers of a corporation, the exercise of that discretion will not lightly be disturbed."

Will it do for this court to assume the right of saying to the defendants, there is another company engaged in constructing a road from Cincinnati through southern Ohio to the Ohio river at Marietta; one line of railroad is all sufficient for the business; and to persevere in your scheme, it is said by the complainant, will be to involve the total loss of the original stock, and to incur a ruinous debt, and you must, therefore, desist? Surely not. If the company have the power to construct the road, it is not for this court to say whether it would be wise or not to build it; and yet, this is the course of complainant's argument, to show that the defendants are abusing the discretion vested in them. The complainant is here asking that equity shall prevent the defendants from doing acts in

violation of his rights under his contract. I may not make a new contract for him, but I must give that which he has made such a construction as will be equitable to all the parties. And in the view which I take of this case, I think I am but carrying out the spirit of the contract by permitting the company to proceed until it be shown that the deviation from the original plan of the road, of which he complains, is inconsistent with, and defeats the design and intention in accepting the amendatory act of March 12th, 1851, and is of such a character as forever to prevent the ultimate accomplishment of that intention.

It was insisted by the complainant in argument that the change could not be made from the first location without the consent of the board of public works, as is provided by the tenth section of the general railroad law. If this point is seriously relied upon, I answer, that it will be time enough to consider that question when the proper authority shall raise it. I do not think it is competent for the complainant to do so.

The last proposition which I am to consider is, whether, if it be necessary to a compliance with the charter of the company, that the road shall terminate at Marietta, or some point above, it is necessary to go there with the main trunk, or by a branch road. 366

If I am right in the view which I have taken of the design in accepting the amendatory act of March 12th, 1851, that it was simply to secure a connection with the Atlantic cities, and that there is a discretion to be exercised in carrying out the power conferred, there is no difficulty in determining this question. In the case of *Bonaparte v. The Camden and Amboy Railroad Company*, 1 Baldwin's R., 205, it was held that, under a charter to construct a railroad from Camden to Amboy, with liberty to make a lateral road to Bordentown, and no route designated between Camden and Amboy, an injunction would not be granted, because the main road goes through Bordentown.

The corporation must confine themselves to the route prescribed, but if there is a discretion not clearly abused, the court will not interfere by injunction.

The court in that case say: "They (the company) may have deviated from the understanding of the legislature in locating the main branch, when they were authorized to construct only a lateral one, but they must depart from the prescribed line before their proceedings can be arrested."

It is, however, scarcely worth the time to pursue this branch of the subject. I have considered the case upon the ground that there is no present intention of going to Marietta at all. The complainant has shown that it would be folly in the company to attempt it at this time; and I am of that opinion. I do not, however, feel disposed to say that they shall do nothing, because it would be wrong to do all they are authorized to do under their charter.

I cannot say that I have not doubts in this case. But that I have doubts is sufficient; and, besides, in what attitude does this complainant appear here? Independent of the influence which his own acts may have had in producing the state of things of which he complains, if he had an equity, he has by his own conduct raised up a counter equity, which, now to overturn, might produce irreparable injury.

"The interposition of this court may produce the greatest possible injustice, if the parties have not applied in time, but have permitted things to get into that state which makes the injunction a proceeding not only enforcing an equity, but calculated to inflict the greatest hard-

ship and injustice." *Graham v. The Birkenhead, Lancashire and Cheshire Junction Railway Company*, 6 English Law and Equity R., 132.

356 There is certainly no power, the exercise of which is more delicate, which requires greater caution, deliberation, and sound discretion, or more dangerous in a doubtful case, than the issuing of an injunction. "It is the strong arm of equity that ought never to be extended unless the case be clear, the parties having acted promptly, and at the earliest moment invoked the aid of this preventive process, which, as must appear, is alone sufficient to avert the impending injury." I have looked carefully into the case, and have endeavored to divest it of all extraneous considerations, and am satisfied that the case is not one of clear abuse of power, or of the exercise of power not conferred. The parties, instead of acting promptly, and at the earliest moment seeking the interference of this court, have acquiesced in what is now complained of, until it would be ruinous to innocent persons to interfere.

If I am wrong in my conclusions, there is a higher tribunal open to correct the error. The injunction granted in this case will, therefore, be dissolved.

RAILROAD.

ON appeal to the district court, application was made to Mr. Justice CALDWELL, of the supreme court, at chambers, to dissolve the injunction, upon which these additional points were decided:

Dissolution of injunctions by single judge—Construction of Crowen's Revised Statutes, chapter 974, section 3; chapter —, section —; what amounts to location of a railroad—Converting bonds into stock.

A judge in vacation has the same right and power to dissolve an injunction as the court when in session.

A judge of the supreme court has jurisdiction as a judge of the district court, throughout the state, and may grant or dissolve an injunction, in a case pending in the district court, as judge of that court, although the application be made to him without the territorial limits of the district.

When a railroad has once been located, the direction cannot be changed by the directors.

Making surveys, or passing resolutions, do not amount to location.

Where a company has power to issue bonds for the purpose of raising money, they may allow the holders of the bonds to convert them into stock. But if this should be done, not in good faith, but for the purpose of keeping the control of the company in the hands of a board of directors, a court of chancery would interfere on the ground of its being a fraud.

An appeal having been perfected by the complainant from the decree of the court of common pleas to the district court of Highland county, and the injunction thereby again made operative, the cause came up for hearing, on the 4th of April before Judge CALDWELL, of the supreme
357 court, at chambers, in Cincinnati, on motion of defendants to dissolve the injunction. Messrs. Thomas Ewing and H. H. Hunter appeared as additional counsel for the complainant, in the argument before Judge CALDWELL.

At the close of the argument, Judge CALDWELL delivered his opinion orally, the substance of which, taken down at the time, is as follows:

The first question which arises in this case is one of jurisdiction. By a statute passed on the 22d of March, 1850 (48th volume of Ohio Laws, page 32, sec. 3, Curwen's Revised Statutes, chap., 974), it is provided, "that any judge of the supreme court, any president judge of the court of common pleas within his circuit, the judges of the superior and commercial courts of Cincinnati, and the superior court of Cleveland, within their respective counties, may grant injunctions and appoint receivers in vacation, upon proper application, as fully as their courts respectively could do in session, and upon the like application and coming in of answers (due notice thereof, in writing, having been given to the party or parties complainant), may dissolve injunctions and vacate receiverships as fully as their courts respectively could do in session: *Provided, however,* that all such orders made in vacation shall be properly written out, attested by the judge making the same, and be filed in the proper clerk's office as part of the proceedings to be recorded."

This law of course had reference to courts existing under the old constitution. This cause has been commenced, since the adoption of the new constitution, in the court of common pleas of Highland county; an injunction was granted in vacation by a judge of the court of common pleas. At the next term of court of common pleas in Highland county, the answer of the defendants having been filed, the cause came on for a final hearing by consent, and the injunction was dissolved, and the bill dismissed. From that decree an appeal was taken, which having been perfected, the case is now pending in the district court, and the question arises whether a single judge has power to act during vacation on a motion to dissolve, under the statute to which I have referred.

By the first section of an act passed on the 30th of April, 1852 (50th Ohio Laws, 102; Curwen's Revised Statutes, c. 1133), it is provided "that all process and remedies authorized by the laws of this state, when the present constitution took effect, may be had and resorted to in the courts of the proper jurisdiction, under the present constitution; and all the laws regulating the practice of and imposing duties on, or granting powers to the supreme court, or any judge thereof, and the courts of common pleas, or any judge thereof, respectively, under the former constitution, except as to matters of probate jurisdiction, in force when the present constitution took effect, shall govern the practice of, and impose like duties upon the district courts and courts of common pleas, and the judges thereof, respectively, created by the present constitution, so far as such process, remedies and laws shall be applicable to said courts, respectively, and to the judges thereof, and not inconsistent with the laws passed since the present constitution took effect."

Strictly speaking, there is no such thing under the constitution and laws of Ohio as a district judge. The district court is formed of the judges of other courts. One of the judges of the supreme court and the judges of the court of common pleas in the proper district constitute the district court. The statute provides that all the remedies under the old constitution shall apply under the new, and recognizes a district court and district judges. I suppose that this is one of the remedies to which the statute was intended to apply. The granting and dissolving injunctions are placed on the same footing, and a judge in vacation has the same right and power to dissolve an injunction as the court when in session.

It has been suggested that I am not a judge of this particular district. I have been assigned to hold the next term of the district court

Highland County.

in Highland county; but this is merely accidental, and makes no difference as to my power to act. Any other judge might sit and exercise the same jurisdiction, and so any other judge of the supreme court might act on this motion. My constituting a member of the district court of Highland county does not arise from any limit to the jurisdiction, but because the jurisdiction is unlimited and general. I suppose that this is a case in which I have jurisdiction as a judge of the district court within the meaning of the statute.

An objection of considerable force has been urged, that the judge of the court of common pleas, who decides a case and dissolves an injunction, may, on an appeal being taken, as a judge of the district court, renew the order. This would seem to follow as a necessary consequence from the construction I have given to the act, as each judge of the district court possesses equal power. This, however, presents no greater difficulty than in the case of granting injunctions. An order granting or dissolving an injunction is merely interlocutory. It is not final or decisive of the case, and a sense of propriety on the part of the judges must be relied on to guard against any abuse of power.

359 I regard this law as most beneficial. A power to grant injunctions is a most useful power; but there is a difficulty in its use growing out of the restraint on the power of the judges to dissolve injunctions once granted. The law provides a mode by which this may be done.

The complainant is a stockholder in the Hillsborough and Cincinnati Railway company, and complains of violations of the charter of that company on the part of directors. The company is about to extend its road east from Hillsborough to a point opposite or near Parkersburg, to connect with the Northwestern Virginia Railway, and various objections are taken on the part of the complainant. It seems that the original intention was to connect with a road to Chillicothe, but this not being successful, there were projects for two rival roads, and it is contended that the extension now proposed will be injurious to both roads. As to this matter the directors must exercise their discretion. In a case of fraud a court might interfere, but not where it is a matter of discretion with those called upon to act. From anything that appears, the acts proposed are not in conflict with the interests of the stockholders; indeed, the evidence shows that the route on which the directors proposed to build the road is the best.

The act of the legislature authorizing an extension of the road east of Hillsborough, was passed on the 12th of March, 1851. And it is first objected that the route authorized by that act is located and cannot be changed. After the adoption of that act by the directors, the stockholders resolved to adopt a particular route east of Hillsborough, known as the Paint Valley route. The directors resolved to construct about fourteen miles of the road on that route. They went further, and entered into a contract for its construction.

It is contended that this was a location of the road, and the directors cannot change it. It has been decided and is reasonable, that a road, when once located, cannot be changed by the directors; but many things may be done which do or do not amount to a location. Making a survey is no location; it has no binding effect. So with resolutions, unless acts have been done giving rights under them. But it does not appear that there were any such rights in this case.

It appears that stock was subscribed with a view to this route. This might or might not have had some effect, but it could have given a right of complaint only to the stockholders so subscribing, or to those residing on the route which has been abandoned. The complainant is not in this situation. There appears to have been no bad faith in this respect on the part of the directors, and if there were, the complainant 360 would have been concluded by having himself advocated a change from this same Paint Valley route. I do not regard anything done by the company as a location. The contract for the construction of the fourteen miles of the road was conditional. The resolution to locate and construct was like any other resolution. A company, like an individual, may change its mind. It would be unfortunate if it could not, and it has full power to do so unless rights intervene.

Another objection is taken, that the general idea in the charter is that the road shall extend to Marietta as a terminus, and that the present idea of the directors is to go to a point opposite to Parkersburg, and stop short of Marietta. The evidence in the case shows that the route on which it is now proposed to build the road is the best route to Marietta. I suppose that the company would have the right to build the road by piecemeal, even without the express provision in the charter. The company is doing no act by which they will be prevented from going to Marietta. They intend to join the Northwestern Virginia Railroad. The power to do so seems full and ample, and I do not see that they are exercising any power, or falling short of any duty in this respect.

It is said that the company, meaning the stockholders as a body, alone can alter the route, and a distinction is drawn between acts to be done by the corporators, and by the board of directors. I suppose, that under the charter of this company, the power to act in this respect is in the directors. The legislature intended that the acts done should be by a mode prescribed by law, and no mode is prescribed by which the stockholders are to act as a body except in the election of directors.

It appears that this company is issuing its bonds, and a charge is made that the directors are guilty of a violation of their duty in selling bonds to be converted into stock; this may be bad policy, and if done in fraud or in evasion of any prohibition of their charter, then the court would interfere. The company has a right to issue bonds for the purpose of raising money, and to allow the holders of those bonds to convert them into stock. But if this should be done, as has been suggested, not in good faith, but for the purpose of keeping the control of the company in the hands of a board of directors, it would be fraud, and a court of chancery would interfere.

In this case no fraud appears to have been intended. The company was deeply embarrassed, and the strongest exertions have been made to relieve it, and to carry on the road with very limited means. It is 361 a question of good faith, but if there were objections to the conduct of the directors in this respect, the complainant appears, from the evidence, to have been so connected with similar transactions, in reference to the bonds of this company, that he would have no right to complain.

It is also alleged that the stockholders of this company have never assented to the change of route. I suppose, as stated above, that the directors are to govern, but the evidence shows a consent on the part of the stockholders to the new route. At the election of directors in May, 1852, there were two parties, and the election turned on that point. The evidence shows, that the board of directors then elected were pledged to

prosecute the extension of the road by a route south of Chillicothe to a point on the Ohio river opposite to, or near Parkersburg.

It may be that the policy proposed by the directors of the company is not the best; it may be otherwise. On this point it is not the province of the court to decide, nor its duty to interfere. As to the other rival road which appears to have been assisting in the prosecution of this case, I have nothing to say. My conclusion is, that there is no ground for injunction in this case, and that it should be dissolved.

JURISDICTION OF DISTRICT COURT.

[In the Sandusky, Ohio, Common Pleas.]

Before Hon. L. B. Otis.

THE STATE OF OHIO v. DAVID C. ROSE.*

District court—Criminal jurisdiction—Murder.

Held by Mr Justice OTIS, that a prisoner indicted for murder in the first degree, cannot, under the existing law, elect to be tried in the district court, that court having, in his opinion, no criminal jurisdiction.

The defendant having been regularly indicted for murder in the first degree, being now arraigned at the bar of the court, moved the court, by his counsel, for leave to withdraw his plea of not guilty, and to enter upon the journals of the court that he elected to be tried in the district court, in and for said county.

362 The prosecuting attorney, *Mr. G. R. Haynes*, objected, and argued that under the new constitution, and the legislative acts made in pursuance thereof, the district court has no original criminal jurisdiction, and can only receive and dispose of the unfinished business, and that, therefore, the defendant could not elect to be tried in the district court.

Mr. C. K. Watson, on behalf of the defendant, argued that the district court was made the successor of the old supreme court on the circuit, and possessed the same criminal jurisdiction; that independent of the body of the constitution, the first clause of the twelfth section of the schedule made the district court successors of the supreme court, and conferred original jurisdiction as a necessary consequence.

Mr. Justice OTIS delivered the opinion of the court:

Under the old prosecution of this state, the supreme court had power to try criminals indicted for capital offenses who elected to be tried therein; and the only question now presented for our decision is whether that power survive, under the new constitution to the district court. By reference to section six, article four, of our present constitution, we find that the only grant of jurisdiction in that instrument to the district court is like original jurisdiction with the supreme court, and such appellate jurisdiction as *may be* provided by law; and by reference to section two of the same article, we find that the supreme court are only invested with original

*This case is reported from two separate reports furnished us by James Murray and R. J. Bartlett.—[EDS.]

jurisdiction in *quo warranto*, *mandamus*, *habeas corpus*, and *procedendo*. In addition to the jurisdiction thus given the legislature have conferred upon the court the power to issue writs of *error*, *certiorari*, and other writs not specially provided for by statute. The power claimed is not, then, a part of the original jurisdiction of the district court. Is it, then, a part of its appellate jurisdiction? By reference to the act of the legislature specifying the cases to which the appellate jurisdiction of the district court shall extend, we find it is confined to civil cases in which the court of common pleas had original jurisdiction. But it is claimed that by section twelve of the schedule, the district court becomes the successor of the old supreme court, and consequently succeeds to the jurisdiction formerly possessed by that court. We think this section only operated to transfer to the district court, the business pending in the supreme court when it ceased to exist. In any event it can hardly be claimed that the convention who framed the constitution, after specifically enumerating the original jurisdiction conferred on the district court, intended to confer on that court by this section of the schedule implied jurisdiction in other cases. Were this a mere matter of practice, it might be claimed that the law conferring it was not repealed by the new constitution. But when we regard it as a part of the jurisdiction of the court we must look for the grant of that jurisdiction either in the constitution or in the appellate jurisdiction thereafter provided by law. We have been able to find it in neither, and have therefore arrived at the conclusion that it does not exist. We therefore overrule the motion of the defendant to elect to be tried in the district court. 363

PLEADINGS—BILL OF EXCEPTIONS.

[In the District Court of Ohio, Hamilton County, April Term, 1853.]

Before Mr. Justice Corwin, Presiding, and Messrs. Justices Carter, Stallo and Woodruff.

THE STATE OF OHIO EX REL. STATE AND OTHERS V. JACOB FLINN AND J. W. McMASTERS.

[Reported by T. T. THRESHER.]

Mandamus—Immaterial issue—Bill of exceptions.

Where answer is made to a mandamus, to put upon file a bill of exceptions, allowed by the court—that there is no bill, but a paper purporting to be, and erroneously recorded as such, a traverse praying inspection, of the record is bad, as raising an immaterial issue.

It is an insufficient answer to a mandamus to put upon file a bill of exceptions, which has been signed, sealed, and ordered to be made part of the record, that it was signed in blank without inspection, under an agreement with counsel afterward to amend, and that the facts therein stated are not true.

When a bill of exceptions has been signed, sealed, and ordered to be made part of the record, it is not in the power of the court to alter or amend, or withhold it from the record, though the statements therein contained may be erroneous; but the court may file a statement therewith of the facts, and its rulings upon them.

Mandamus to the judge and clerk of the criminal court of Hamilton county, to produce a certain bill of exceptions, said to have been allowed by the court, but withheld by defendants from the record of the file of plaintiff, on the criminal charge of the court below.

To the writ defendant's answered that there was no bill of exceptions, but that there was a paper, purporting to be a bill of exceptions, the history of which said paper was as follows:

364 At the last hour of the last day of the term, during which the trial was had, counsel for the prisoner came to the judge with a paper, which he signed in blank as a bill of exceptions, agreeing with counsel that at a subsequent meeting of court a council should be held to inspect the bill, which, if incorrect, should then and there be made to conform to the truth. An entry was made on the journal that counsel for the prisoner came and presented their bill of exceptions, which was signed, sealed and ordered to be made part of the record. The bill remained, sometimes in the hands of the prosecuting attorney of the court, sometimes with the judge, but was never delivered to the clerk. It was annexed to and made part of defendant's answer, which further declared that the statements contained in the paper, purporting to be a bill of exceptions, *were not true*.

This answer was traversed by counsel for the plaintiffs, who alleged that there was a bill of exceptions, and prayed an *inspection of the record*.

Counsel for the defendants objected to the traverse, as raising an immaterial issue, and in support of the sufficiency of the answer, cited *Atkins v. Todd*, 4 Ohio R., 351.

CORWIN, P. J., held,

That the traverse to the answer must be set aside, as raising an immaterial issue, and the case decided upon the sufficiency of the answer.

It was decided in the case cited from 4 Ohio Reports, that the court are not bound to sign a bill of exceptions unless the facts therein set forth are true, and that the facts are not truly stated is sufficient answer to a mandamus to sign said bill. But this case is not in point. There a paper was presented to the court as a bill of exceptions, it was signed as a bill of exceptions, sealed as a bill of exceptions, with the seal of the criminal court, and was ordered as such to be made a part of the records of the court, and these facts are so stated in its minutes. This paper then became a part of the record, and a good bill, unless it was rendered void by the fact that an agreement to amend was made, and that agreement not carried into effect.

The court erred in supposing they could so amend it. It was decided in *Hicks v. Person*, 19 Ohio R., 426, that a bill of exceptions to be valid must be signed and sealed, stating the term in which the decision excepted to is made. The bill amended after the close of the term would be a different bill from that made up before its adjournment, and consequently void.

365 Neither court nor counsel, with or without agreement, could alter or amend that which, by the proper formality, had become a part of the record, and such alteration or amendment would amount to nothing. A peremptory mandamus is awarded to cause the bill of exceptions to be filed with the records of the case. It is in the power of the court below to place on file also a true statement of the facts in the case, with an account of its rulings thereupon. How such statement would be considered on a trial in error is not for this court to say.

Mr. N. C. Read, for Plaintiffs.

Mr. G. E. Pugh, for Defendants.

EMINENT DOMAIN.

[In the Huron County, Ohio, District Court, April Term, 1853.]

Before Mr. Chief Justice Bartley, Presiding, and Messrs. Justices Humphreyville and Otis.

LEWIS WARD v. THE TOLEDO, NORWALK AND CLEVELAND RAILROAD COMPANY.

Railroad laws—Entry on lands to appropriate—Constitutional law—Trespass against a corporation.

The legislature may confer upon a corporation the right of entering upon the lands of private persons, without compensation, for the purpose of making surveys, etc., preparatory to appropriating them for a public use. The right of examination and survey is incident to the right of appropriation, and necessary to its proper exercise. (See 3 Curwen's Revised Statutes, 1879.)

The act of February 11, 1848 (Curwen's Revised Statutes, chap. —), makes the payment or tender of the damages assessed, to the clerk, or the giving of security, as may be required, a condition precedent to the right of taking possession for the purpose of constructing a railroad; and any possession taken without this is a wrongful act, for which the company are liable in trespass.

This was an action of trespass *quare clausum fregit*. The declaration contained one count, laying the trespass with a *continuando*, from the 1st of January, 1852, to the commencement of the suit. The alleged trespass consisted in entering upon and taking the lands of the plaintiff, digging ditches and constructing its line of railroad.

There were three pleas:

1. General issue.
2. An entry upon the land by virtue of the laws of the state, for survey and examination, for the purpose and with the intent of appropriating so much as was necessary for the constructing its line of road, and that no unnecessary injury was done. 366

3. That the subsequent alleged trespasses were done after the defendant had filed an instrument of appropriation, and had taken such proceedings as were directed by law, reciting particularly the things necessary to be done under the act regulating railroad companies, and that before the commencement of this suit the company paid the clerk the amount of damages so assessed in those proceedings.

To the special pleas demurrers were filed.

In support of the demurrer it was contended that the act of 1848 did not give the right of entry on land without some proceeding in a judicial way to divest him of it, and that the act of entry and of appropriation depended on the same course of procedure. But if the entry were positively authorized by the act aforesaid, without the assent of the owner, the act, in this respect, was unconstitutional.

As to the third plea, it was contended that the plea must aver that the damages awarded were tendered before the entry upon the land or the commission of the alleged trespass, and the tender of damages before the commencement of suit, was insufficient.

It was also urged that the law of 1848, on the subject of damages, was precisely similar to the provision of the act for appropriating property in the Cleveland and Pittsburg railroad charter, decided in Cuyahoga

county, and reported in 10 Western Law Journal, 138. That the mode pointed out in the act for making compensation was unconstitutional and void, because the law did not provide for the injury which might be done to remaining and adjacent property.

On the other side, it was contended that the right of entry was a necessary right, without which the right of appropriation could not be exercised; that the law gave this right unequivocally to the company, and as long as the company do no unnecessary damage, they have the right to enter and make examination.

It was contended, also, that the company having pursued the act, and filed its instrument of appropriation, having had a committee and assessment, from which the plaintiff in this suit had appealed, the right of entry then became perfect, and it was not necessary that the company should pay to the plaintiff, or even tender him the damages assessed. Such an act would have been a nullity, which the law would not compel the company to do.

367

Mr. Justice OTIS delivered the opinion of the court, as follows:

The demurrer to the second plea raises the question whether the legislature can authorize a railroad company to enter upon the lands of an individual without compensation, in order to survey and make examinations for its line of road. This court hold that the legislature may properly and constitutionally confer this right, and that the company may exercise it, doing no unnecessary damage. The legislature, it is conceded, may impart to the railroad company the right of eminent domain upon and over the lands of this state, for the purpose of public improvements. The right of survey and examination is an incident of the right of appropriation, and necessary to its proper exercise. It is not known how a company could very well determine upon the right of appropriating the soil upon which to construct its road, unless it has the prior right of examination for that purpose. The demurrer to the second plea is not well taken, and must be overruled.

The third plea presents a distinct question. In that plea the pleader has set forth the appointment of appraisers, the assessment and return of the damages sustained by the plaintiff, the appeal to the court of common pleas, and the appointment by that court of a different committee, the assessment and return by that committee, the appropriation of the soil, the performance of work, and the deposit with the clerk, before the commencement of this suit, of the damages assessed by the last named committee.

The law under which the defendants have acted, requires them, upon return of the appraisement, to deposit with the clerk the amount of damages assessed, or give security to the satisfaction of the judge who issued the warrant.*

This we hold to be a condition precedent to the right of entering upon and taking possession of the land so appropriated, for the purpose of constructing a railroad. The pleader has not averred the performance of this condition, and his plea is bad.

It does not vary the case that the party appealed to the court from the decision of the first set of appraisers. The equivalent or compensation for his property is first to be paid before the right can exist to take possession of the premises appropriated. As long as the company neglected

*Curwen's Revised Statutes, chap. 46, 43.

or refused to make deposit of the compensation awarded to the plaintiff, so long they were intruders, and are liable therefor.

The defendant has raised the question whether a corporation is liable to an action of trespass *quare clausum*. There is some uncertainty perhaps upon the law in Ohio on this point, but, following the case settled in 9 Ohio R., 31, which does not appear to be overruled in this state, we are disposed to consider the objection well taken. Inasmuch as it is, however, a question of mere form, we will allow the plaintiff to amend in this particular without imposing any condition.

Messrs. O. E. Kellogg, and J. R. Osborn, for Plaintiff.

Messrs. Worcester & Penewell, for Defendants.

LIMITATION OF ACTIONS.

386

[In the District Court of Ohio, Gallia County, April, 1853.]

Before Messrs. Justices Caldwell, Nash, Peck and Whitman.

DROUILLIARD v. WILSON, ADMINISTRATOR OF WHITE.

[Reported by Mr. Justice NASH.]

Mutual accounts—Application of payments—Acknowledgments by administrator

The statute of limitations begins to run on an account current from its close.

Where an account is based upon mutual dealings between parties, it is closed by a termination of the mutual dealings.

Where a clerk and sheriff respectively received fees coming to the other, and by agreement each retained those received by him for the other, with the intention of settling the same as an account between them; it was held that the account was closed, when the term of office of the sheriff expired.

Payment to prevent the running of the statute of limitations, must be the act of the party; the payee, who has received money of the payer of a note or account, cannot apply the same in such a way as to affect the running of the statute.

An acknowledgment to prevent the running of the statute of limitations must be positive, unequivocal and direct, and admit the existence of a previous debt or claim, which he is willing to pay.

Where A said to C, he had an unsettled account with B, and wanted him, C, to look it over and adjust it, as he thought B owed him on the account; this was held not a sufficient acknowledgment to prevent the running of the statute.

An administrator or executor has no power by a new promise to revive a claim or debt already barred by the statute of limitations.

The personal representative is authorized to allow all claims which can be legally enforced against the estate; and so claims not barred at the time of their being presented to him duly authenticated.

Whatever may be the decisions elsewhere, since the decision in 17 Ohio R., 9, no personal representative can, by any promise of his, enable a creditor, whose claim is barred, to recover the same against the estate. To hold this would be to hold that he could make new contracts for his intestate.

This was an action of assumpsit for money had and received, and on the other common counts.

The declaration contained two counts; one on a promise made by the intestate, the other on a promise made by the administrator on an indebtedness of the intestate. The pleas were the general issue, and a plea of the statute of limitations of six years. To this special plea there was a replication that the cause of action did accrue within six years.

The case was submitted to the court upon the issues joined, without the intervention of a jury, and the evidence showed the following state of facts :

The plaintiff was clerk of the court of common pleas and supreme court in this county, and the said John White had been sheriff of said county for four years, from October, 1837, to October, 1841. While the parties were so clerk and sheriff, they had each received fees in cases belonging to the other, by consent, and held the same subject to a final adjustment between the parties. No account was actually kept, either by the clerk or the sheriff, of the amounts so respectively received ; but it appeared to be the clear understanding between them that there was an account existing between them, to be settled and adjusted. The case had, by consent, been referred to a commissioner to examine the records, executions, dockets, papers, etc., to ascertain the facts, and state the amounts received by each. The report showed a large balance in favor of the plaintiff. The mutual receipt of fees was closed when White went out of office, in the fall of 1841. The plaintiff, had, as clerk, received small amounts of fees coming to White, up to October term of the common pleas, 1842. The plaintiff had also an item or two subsequent to that date, and one as late as 1844, for fees due him from the defendant's intestate in certain cases wherein White was a party.

White died in September, 1846, and the defendant was appointed administrator in March, 1847.

The plaintiff proved that in September, 1846, White, a short time before his death, told the witness that the accounts between the plaintiff as clerk, and himself as sheriff, had never been settled ; and White requested the witness to examine the same and adjust them for him. White further said he supposed the plaintiff owed him two or three hundred dollars.

It was further proved that early in the year 1849, the plaintiff and said administrator undertook to examine these accounts, and the plaintiff being furnished with papers by the administrator, caused the same to be
387 made out and stated, and showed to the administrator ; and the administrator promised to pay this balance so found to be due from said intestate to the said plaintiff, and said that he would apply for a sale of real estate to do it. The administrator afterwards declined to pay the claim, whereupon this suit was prosecuted to recover the same.

Mr. Perry, for the plaintiff, claimed that the evidence showed the existence of a running account, which was not closed until the date of the last item in 1844, and hence the limitation had not run out when the suit was brought in 1849.

He also insisted that White's request to have the witness settle this account, in 1846, was such a recognition as would take it out of the operation of the statute.

If these points were against him, he then insisted that the promise of the administrator was effective to remove the bar. Such, he insisted, was the weight of authority in this country and in England. 15 Johnson's R., 3 ; 16 Massachusetts R., 439 ; *Emerson v. Thompson*, 13 Ohio R., 271 ; *Pierce v. Zimmerman's Executor*, Harper's South Carolina R., 355.

Mr. A. Cushing, for defendant, referred to the cases cited in the argument in the case of *Pierce v. Zimmerman's Executor*, 13 Ohio R., 271, and to the opinion of the court, showing it to be an open question in Ohio.

The opinion of the court was delivered by Mr. Justice CALDWELL.

The first question presented in this case is, when did this cause of action accrue? Did it accrue more than six years before the bringing of this suit? This depends upon the character of the items constituting the plaintiff's claim. Ordinarily, money collected by a sheriff is not the subject of an account; each execution is a separate transaction, and must be treated as such. But in this case the parties appear to have treated the money received by each, as money arising on mutual dealings and as constituting the matter of a running account, to be eventually settled and adjusted as such. We think, therefore, that the acts of the parties estop each from denying that such was the character of their mutual receipts of money.

This then being the character of these dealings, the statute would not begin to run until this relation between them had ceased, and the account was closed. The intestate ceased to be sheriff in the fall of 1841, and with that, ceased to collect or receive money for the use of the plaintiff. From this point of time all mutuality in this account 388 ceased; the relation between the parties, out of which this mutual accounting arose, then terminated, and the account after that, if one could exist, must of necessity have been entirely one-sided. We think, then, that this account was closed at the moment of time at which the intestate ceased to be sheriff and this was in the fall of 1841; and the suit was not commenced until the spring of 1849, over seven years after the cause of action accrued. Hence, the plaintiff's claim is barred, unless it is taken out of the operation of the statute by some competent evidence.

It is claimed, in the first place, that there are items here charged as late as 1844; but these items had no relation to this account between the parties; they are for costs due to the plaintiff in cases in which the intestate was himself a party, and which, of course, are evidenced by the record, and cannot, by any reasoning, be made a part and a continuation of this account of moneys received respectively by each for the other, as clerk and sheriff. We think, therefore, that the debtor side of the account was closed, when the intestate made his last return as sheriff.

It is further claimed that here are *credits* in this account, coming within the limitation of six years. But how did these credits originate? They were not *payments* made by the intestate; if they had been, then the argument would be conclusive; that fact, under our statute, would prevent the running of the statute. A payment, made before a claim is barred, has the effect of doing away with the time already past, and the statute begins to run only from the date of such payment. 17 Ohio R., 9. But was this a payment? A payment implies the voluntary act of a party; an act which is a direct recognition of the existence of the claim on which the payment is made. Hence, the party paying must have paid money to be applied on the particular debt or claim, the limitation of which is thereby to be extended. In this case the plaintiff, as clerk of the court, received money in his official capacity, which was going to the intestate, White; and when received it was money in his hands for the use of the intestate, for the faithful payment of which the sureties on his official bond would be liable. This money, so received and held, could be applied as a *payment* only with the consent of the intestate. It was not in the power of the plaintiff to convert this receipt of money into a payment, so as to affect the rights of White in his absence and without his consent. A setoff and a payment are, in legal contemplation,

very different things. We have, therefore, no hesitation in holding that
389 there was here no *payment* by the intestate of these sums on
this account; and hence that these credits can have no effect to
stop the running of the statute.

It is, however, claimed that White, in 1846, recognized the existence of this account; and that this is equivalent to an acknowledgement. The acknowledgment of the existence of a debt, before it is barred, suspends the running of the statute. Our statute expressly gives this effect to an acknowledgment; but the acknowledgment must contain an unqualified and direct admission of a previous subsisting debt, which the party is liable and willing to pay. *Ventris v. Shaw*, 14 N. H., 422. To say that one would not insist upon the statute, if the account was just, while at the same time he denies its justness, is not sufficient to stop the running of the statute. *Carruth v. Paige*, 22 Vermont R., 179. The cases are clear upon this point. *Brown v. State Bank*, 5 English R., 134; *Kensington Bank v. Patton*, 2 Harris R., 479. The evidence in this case shows, that while the intestate recognized the existence of an unsettled account, he claimed that the plaintiff owed him, instead of acknowledging that he owed the plaintiff. Such an acknowledgment or admission is wholly below the requirements of the statute and the decisions, and cannot stop the running of the statute.

This claim was then barred in the fall of 1847, and this cause of action, as against the estate of White, then became *extinct*, as was decided in the case of *Hill v. Henry*, 17 Ohio R., 9; and hence we are driven to decide whether the promise made by the administrator in 1849, can be effective to do away with the bar of the statute. This is an important question, and was left undecided in the case of *Pierce v. Zimmerman's Executor*, 13 Ohio R., 271. It is then an undecided question in Ohio.

The authorities cited by plaintiff's counsel, as well as those cited by counsel in the case in the 13 Ohio R., 271, show that in England and the older states, it has been held that the promise of an administrator will remove the bar of the statute, and enable a party to recover; while upon the other hand there are authorities which deny this right to the administrator. Such are the decisions in Pennsylvania, *Frity v. Thomas*, 1 Wharton R., 66; *Case v. Cushman*, 1 Barr R., 241; 5 Barr., 225, such, too, seems to be the decision in Mississippi, *Henderson v. Ilsley*, 11 Smedes and Marshall, 9.

On principle, speaking for myself, I should have no hesitation in holding, independent of the decision of the supreme court in the 17 Ohio R., 9, that an administrator has no power to revive a claim, once barred by the statute of limitations. The duties of the administrator
390 are limited to collecting the debts due to, and to the payment of
those owing by, the intestate. What right he has to be generous with the property of others, to pay debts for which there exists no legal liability against the estate, I could never comprehend.

But whatever may be the law elsewhere, we have to expound it as we find it settled in Ohio. In *Hill v. Henry*, 17 Ohio R. 9, the supreme court held that the effect of our statute, when it had once run out, was to *extinguish* the debt or claim, so that no recovery could be had on the original promise or obligation; but that the recovery could only be had on the *new promise*, supported and upheld by the moral obligation resting upon the debtor to pay the original debt. Such, then, is the law in Ohio. Now can an administrator make a *new contract* to bind the

estate, predicated upon a mere moral obligation, resting upon the intestate? We think not. The administrator has to execute *legal* liabilities existing against the state; he has nothing to do with *moral* obligations resting upon others. His duty is to audit, allow and pay the *legal* liabilities of the estate; and hence he can allow all claims not barred; but when once barred by the statute, he has no authority to create a *new* liability, predicated upon a mere *moral* obligation, resting upon others. Whatever, therefore, may be the decisions elsewhere, we have no hesitation in holding that, under the provisions of our statute, as expounded by the supreme court, an administrator cannot, by a new promise, revive a claim once barred. Judgment, therefore, must be entered for the defendant.

WHITMAN, J. I am compelled, very reluctantly, however, to acquiesce in this decision. There seems to be no means of escaping the effect of the decision in the 17 Ohio R., 9. By that decision this claim became extinguished in 1847, and no recovery could ever have been had upon it; there can then exist in Ohio, no doctrine of the waiver of the statute; there must be a new contract based on a mere moral obligation; and no one ever supposed that a personal representative had power to create new contracts. Independent of this decision, I should have held the new promise effective to authorize a recovery.

NASH, J. In the court below, I ruled this case in favor of the plaintiff, in obedience to what I supposed to be the weight of authority, though my own mind has never been brought to acquiesce in its correctness. I never could understand what right an administrator had to pay debts which had ceased to be inforcible in a court of justice. The case in 17 Ohio R., 9, was not at that time brought to my mind, or I might then have felt at liberty to have decided otherwise. But that case necessarily settled this, unless we are prepared to hold that an administrator can create contracts based upon a mere moral obligation to the same extent as the intestate himself. Hence he might, by a new promise, revive a claim barred by a certificate of bankruptcy, or released on a composition among creditors with the intestate in his lifetime. This would hardly be claimed by anyone. I, therefore, cheerfully concur in the opinion first pronounced, because, independent of our own statute and decision, and on principle, I never could understand how a mere trustee could be allowed to pay debts which had ceased to exist as a *legal* charge upon the estate. 391

PECK, J., who had left the court before the opinion was pronounced, expressed his concurrence in the decision.

CORPORATIONS—RAILROAD LAW.

[In the District Court of Ohio, Huron County, April Term, 1853.]

Before Mr. Chief Justice Bartley and Messrs. Justices Otis, Humphreyville and Starkweather.

CHAPMAN AND HARKNESS v. THE MAD RIVER AND LAKE ERIE RAILROAD COMPANY, AND THE SANDUSKY CITY AND INDIANA RAILROAD COMPANY.

Evading injunctions—Right of stockholders specifically to enforce conditions of subscriptions—Corporations acting under charters of other corporations.

A court of equity will restrain by injunction those who seek by indirect and equiva-

lent means to attain an end which the court has previously forbidden to be consummated.

Stockholders who have subscribed to a railroad upon condition of its being located through a particular place, may compel a specific performance of the condition upon which the contract was made.

A corporation created for a specific purpose, cannot become the mere dependent or creature of another corporation, to effect ends which the latter cannot lawfully consummate.

Although the validity of acts of incorporation cannot be collaterally inquired into, yet it may be shown, as a matter of fact, that a pretended organization was not instituted in good faith to carry out the legitimate purpose and intention of the law.

392 A bill in chancery was filed in the late supreme court for the county of Huron, in July, 1851, by Frederick Chapman and Lamon G. Harkness, against the Mad River and Lake Erie Railroad company, wherein it was set forth that the complainants were the proprietors of the village of Bellevue, in said county, and of other real estate in that vicinity, and that some years ago they made sundry contracts with said railroad company, then engaged in the construction of a railroad under an act of incorporation conferring upon it the authority to construct and maintain a railroad from Dayton, in the county of Montgomery, through Springfield, Urbana and Tiffin, to Sandusky City, in Erie county; that the said company, at that time, being in great need of means for the construction of its railroad, entered into a written contract with complainants, whereby it was agreed, that in consideration that the company should locate, construct and continue, the main line of said railroad between Tiffin and Sandusky City, on a route passing through Bellevue, complainants bound themselves to convey to said company the one-fourth of the unsold lots in said village, and also the right of way for said railroad through the village, and through the other lands of complainants, being over one mile in distance; and that pursuant to the contract the company did locate and construct its road on the route, and complainants conveyed to the company the village lots, being eighteen in number, and the right of way through the village and lands; that some years afterward, the company still greatly needing further assistance for the completion of its road, complainants subscribed and paid up one thousand dollars to the capital stock of the company, in consideration to a right to a side track from the main line of the railroad to a warehouse, for doing a forwarding and receiving business at Bellevue, and that complainants still hold the stock in the company, and have constructed a sidetrack and warehouse, at great expense and cost to themselves.

That afterward complainants entered into another contract with the company, whereby they paid the company five hundred dollars in money, in consideration of a right to a private sidetrack from the main line of the railroad to another warehouse at that village, which sidetrack and warehouse were also constructed by complainants at great cost, etc. Complainants also alleged that they are still the proprietors of the greater part of said real estate, warehouse, etc., and extensively engaged in the forwarding and receiving business, in connection with the main line of the railroad, and that said company, in violation of its contracts with complainants, and without legal authority, has determined to change the route of its

393 road from Tiffin to Sandusky City, and have actually commenced the construction of a railroad on another route, passing eight miles west of Bellevue, with the view of abandoning entirely the route through that

village, to the great injury of complainants in their property, rights and business. Complainants prayed for an injunction, etc.

The company, through its president, filed an answer to the bill, admitting the contracts, stock, property and business of complainants, but claiming the right under the laws of the state, to make the alleged change in the location of its railroad.

On an application before Judges Hitchcock and Spalding, an injunction was granted July 26, 1851, restraining the company from making the contemplated change in the location of its railroad.

In August, 1852, a supplemental bill was filed, charging an attempt on the part of the Mad River and Lake Erie company to evade the injunction by circuitry, and the device of constructing their railroad on their newly selected route between Tiffin and Sandusky City, under a sham or pretended organization, under an act incorporating a company styled "The Sandusky City and Indiana Railroad company," and authorizing the construction of a railroad from Sandusky City to some eligible point to be selected by the company on the western line of the state of Ohio, or southern line of Michigan, with a branch to the western bank of the Maumee river. A supplemental bill called upon the Mad River Railroad company for an answer through its officers under oath.

The Mad River company through its president filed an answer, not under oath as called for, denying that the Mad River company was in any manner engaged in the construction of a railroad on the new route, but claiming the right to connect with and run the road by agreement with the Sandusky City and Indiana Railroad company.

It appeared that immediately after the provisional injunction was granted, the president and superintendent of the Mad River company gave out in conversation that there was another way by which they could accomplish the object notwithstanding the injunction. And in a short time the officers, directors and attorneys, of the Mad River company made a hasty organization under the act incorporating the Sandusky City and Indiana Railroad company, the authorized capital stock of which is three millions of dollars. The amount of stock subscribed under the organization was a little over fifty-one thousand dollars, of which twenty-five thousand were subscribed by the president of the Mad River company, and twenty-five thousand by the superintendent, and the remaining few shares by the directors and attorneys of the Mad River company. 394

It did not appear that any money had ever been paid on this stock, but the subscribers of the stock gave their notes without interest for the same, which were placed in the hands of the treasurer of the Mad River company. Bonds were executed in the name of the Sandusky City and Indiana Railroad company to the amount of three hundred and fifty thousand dollars, and placed in the hands of Mr. Henshaw, of Boston, Massachusetts, who was the treasurer of the Mad River company, and who upon these bonds, advanced or procured the money for building the road on the new route from Sandusky City to Tiffin. The officers, directors and attorneys of the Mad River company were the only stockholders, officers and agents who managed and controlled the new company. The Mad River company furnished its engineers and its construction train for making the new road; also furnished the iron rails and plates and spikes for laying it. No attempt was made to locate or make the new road beyond Tiffin, and Tiffin is not on the direct route from San-

usky City to the western terminus fixed by the charter, and finally the new company consummated its labors by a perpetual lease of the new road from Sandusky to Tiffin, to the Mad River company, stipulating that the latter company should have full and ample authority to use the franchises, privileges, road and name of the new company; in consideration whereof, the said Mad River company became bound to pay the bonds and all the liabilities incurred by the new company amounting to three hundred and sixty thousand dollars; also, all taxes which might be assessed on said road, etc., leased, and also to finish said new railroad, making all necessary side tracks, warehouses, stations and other fixtures, and to use, manage and control the same forever, as fully in every respect as the new company could, without any stipulation that the stockholders in the new company were ever to pay up one dollar on their stock notes, or ever to receive any dividends or profits of any kind whatsoever, as stockholders, in said new company. The officers in the new company during the construction of the new road received no salaries or compensation as such officers.

The president and superintendent of the Mad River company, constituted the executive committee of the new company. The new road connected with the Mad River railroad in the depot and buildings of the Mad River company at both Tiffin and Sandusky City, and the business of the new company was transacted in the office of the Mad River company. During the construction of the new road, it did not appear
395 that the Mad River company had made any dividend or rendered any account of the appropriation of its income or profits.

It appeared that the new road was some three miles and a half nearer than the other, and avoided on the route, in all an elevation of something like one hundred and thirty feet, and was considered preferable on account of the convenience of water and gravel.

The counsel for the Mad River company, asked for a continuance of the cause, for the purpose of being enabled to take the deposition of Mr. Henshaw, of Boston, the treasurer of the Mad River company, to prove by him that the new road was not constructed by the money of the Mad River company. For the purpose of avoiding a continuance the complainants admitted that Mr. Henshaw would so testify.

Mr. Chief Justice BARTLEY delivered the opinion of the court.

The complainants, as stockholders in the Mad River and Lake Erie railroad company, have a right in a court of equity, to restrain the corporation from any misapplication or illegal use of its funds, or any abuse of its corporate powers which would furnish any cause for the forfeiture of its franchise; and it does not appear that this railroad company has brought itself within any provision of law authorizing a change in the location of its road between Tiffin and Sandusky City.

The contracts of the complainants with the company, have been fully established, and are binding on the company, and will be enforced in a court of equity. The company had the benefit of these contracts when it was greatly in need of aid in the construction of its road, and the complainants upon the faith of these contracts were induced to make large investments, and have acquired important rights under them. The company cannot now repudiate these contracts by changing the location of the main line of its road. Such an act would violate the rights of private property which the constitution of the state declares shall be held inviolate.

It was upon this ground that the late supreme court granted the provisional injunction, and upon final hearing we see no cause for any different determination in this respect.

Railroads are the great improvements of the age, and the corporations by which they are managed, exercise important functions and extensive powers in which they must be protected; but while they ask the protection of the laws in their rights, they must observe their contracts with the individual citizen, and they will not be tolerated in trampling upon the rights of private property so long as our judicial tribunals maintain their independence and integrity. The interests of the public as well as the interests of this company might, perhaps, be benefitted by the contemplated change in the location of this road. But this furnishes no justification for the violation of the solemn contracts of the company, or the sacrifice of those rights of private property invested and built up under a confidence in the integrity and good faith of the company. 396

In the proceedings under the supplemental bill, it is claimed on one side that the Mad River company is attempting to evade the injunction by artifice, and to accomplish indirectly what it has no right to do directly, and on the other side it is insisted that the new road has been constructed in good faith by another and distinct corporation, and that the Mad River company simply claims the right of a connection with it.

It is not claimed that the validity of the act of incorporation of Sandusky City and Indiana Railroad company can be impeached collaterally, and the existence of a company under an act of incorporation cannot be defeated by a mere irregularity or informality in its organization. But it was adjudged by the supreme court of this state in the case of *Bartholomew v. Bentley*, decided at the special term in March, 1852, 9 Western Law Journal, 337, that the actual organization and existence of a company in good faith under an act of incorporation, and in conformity to its substantial requirements, was a matter of fact which might be inquired into, and that the existence of a corporation was not sustained by proof of a mere sham or pretended organization, not instituted in good faith to carry out the legitimate purpose and intention of the law.

In the case before us, it is a mere question of fact, to be determined from the evidence, whether any company has been actually, and in good faith, formed so as to constitute a distinct legal existence, as a corporation to carry out the legitimate purposes and intent of the law incorporating the Sandusky City and Indiana railroad company.

This act of incorporation authorizes the formation of this company as a distinct, independent, legal existence for the construction of a railroad from Sandusky City to some point on the western line of this state, or the southern line of Michigan, with a branch to the west bank of the Maumee river. The corporation here authorized must have a separate, distinct, legal existence of itself, and not as a mere dependent, or creature of another corporation, and the power conferred authorizes the construction of a distinct and independent railroad between the points specified, and not a mere branch or appendage to another road for running trains between Cincinnati and Sandusky City. It is a familiar principle, well settled by adjudication, that the charters of corporations are to receive a strict construction, and that no powers can be exercised by them, except those expressly granted, and such incidental powers as may be necessary to execute and carry out the express authority conferred. Under the mere pretense of executing a power expressly conferred, a company can- 397

not be sustained in doing another and different thing. It would be an abuse of the franchise, and a fraud upon the law to allow a company, under the mere artifice of false pretense of executing a distinct, indivisible and express power to do an entirely different thing and for a different purpose.

From the testimony before us we are unanimous and clear in the opinion that the alleged organization of the company under the Sandusky City and Indiana railroad charter, is not a distinct, independent corporation within the purview and true intent of the charter, but a mere creature of the Mad River company; that the purposes and intent of this organization was not to carry out the legitimate object and execute in good faith the power granted by this charter, but in truth and in fact, to construct a railroad on a new route between Sandusky City and Tiffin, selected by the Mad River company, and for the use of that company, and that although the mere form or sincerity of a pretended organization under this charter has been resorted to, to get in substance and reality, all that has been done in the construction of this new road, has been done by the Mad River company.

The new company had no adequate amount of stock subscribed, and none in fact paid up, unless indeed, the stock notes without interest, placed in the hands of the treasurer of the Mad River company, could be considered a payment. But how could a company with only fifty-one thousand dollars of stock subscribed, build even that part of its road which, it seems, had already cost three hundred and sixty thousand dollars? And how could a corporation, with only that amount of capital, have a credit in a foreign market with which to procure money on its bonds to the amount of three hundred and fifty thousand dollars? Why were some of the stockholders in this new company so forgetful of the amount of stock held by them in it? And when the arrangement was finally consummated by the perpetual lease and transfer of the whole substance and very existence of the new company over to the Mad River company, why was not at least some future contingent dividends, 398 profit or advantage to the stockholders in the company in some way provided for?

The truth is, the stockholders in the new company, as such, having paid nothing and done nothing, it was not necessary either to provide for refunding to them any money advanced, or for paying them dividends or profits in future; we are left to presume that the expenditure of the three hundred and sixty thousand dollars being entirely out of kindness and good will to the Mad River company, it was not thought necessary that the new company should ever in future have any benefit from it, either by the way of dividends or otherwise. The evidence before us, taken together, fully warrants the conclusion that the construction of this new road was, in truth, the act of the Mad River company, done under the cloak or pretense of a different corporation by way of evading the injunction granted in this case.

The purposes of a court of equity are not to be defeated by circuitry or artifice. Parties at the very time when they are seeking protection in their just rights in a court of equity, are not to be circumvented by chicanery in any cunning device. One important object of equity is to afford protection against such means of injustice.

Even suppose the new company to have been legally constituted, and to have constructed the new road as its own work, and by its own means, the Mad River and Lake Erie railroad company could not pur-

chase the road or lease it and use it as the main line of its road, without a violation of its contracts with complainants. The object of the Mad River company is to use the new road as its main line, otherwise, it would be of but little use to it.

The complainants are entitled to a decree in their favor.

The counsel for the defendants moved the court to reserve the cause for decision by the supreme court, in view of the importance and difficulty of the questions which arise in the case.

The court, on consultation, determined to reserve the cause, as requested, and granted a provisional injunction in the meantime, under the following order:

First—That said Mad River and Lake Erie railroad company shall not change the location of the main route of their road from Tiffin to Bellevue.

Second—That the Lake Erie and Mad River railroad company shall not use the railroad of said Sandusky City and Indiana railroad company, in any way, either by connection or otherwise, as a railroad, except for the purpose of gravelling the road of the Lake Erie and Mad River railroad company. 399

Third—That the Lake Erie and Mad River railroad company shall not use any of their means toward completing, or running, or otherwise using the road of the Sandusky City and Indiana railroad company, or apply their means toward paying the bonds in the lease in the pleadings mentioned, or any other liability of Sandusky City and Indiana railroad company.

Fourth—That the injunction hereby granted shall not take effect until the complainants give bonds and security in the sum of ten thousand dollars, to be approved by the clerk of this court.

RAILROAD LAW.

[In the District Court of Ohio, Huron County, May Term, 1853.]

Before Mr. Justice Corwin, Presiding, and R. S. Hart.

CHAPMAN AND HARKNESS v. THE MAD RIVER AND LAKE ERIE RAILROAD COMPANY, AND OTHERS.

Dissolution of injunction by single judge—Construction of Curwen's Revised Statutes, Chap. 974, Sec. 3; Chap. 1133, Sec. 1; Chap. 817; Chap. 1196—Order of reservation of cause to supreme court—Location and relocation of railroad—Construction of the charter of Mad River and Lake Erie Railroad—Accepting amendments to charter—Estoppel by making one party defendant—Effect of subscription on condition of locating.

A judge of the district court, upon a case being reserved in that court for decision in the supreme court, has the same power to dissolve a preliminary injunction in vacation, as the court itself has when in session.

An order of reservation does not of itself transfer a case to the supreme court. Unless the papers are filed in the supreme court and the cause docketed, the order of reservation is vacated, and the cause stands for hearing in the district court, as though no order of reservation had been made.

A power to locate a railroad is exhausted by an actual location. No relocation can be had, under such a power. The case of *Moorehead v. The Little Miami Railroad Company*, 17 Ohio R., 340, approved.

The Mad River and Lake Erie Railroad company were, by their amended charter, authorized to relocate their road whenever a better and cheaper route could be had.

A provision in the charter of a railroad that the legislature may amend it, is a part of the original contract, and those who become stockholders in the company have no right to deny the power conferred by an amendment made in pursuance of such a provision, and which has been accepted by the majority, unless the means of the company are being appropriated to purposes foreign to the original objects of the association.

400 Where the complainant has made a company a party defendant, by its corporate name, he is estopped to deny in that suit the corporate existence of that company.

Where subscriptions are made to a railroad company upon condition that the road be located through a certain place, the parties making the subscription have no right to prevent the company from exercising the power conferred by their charter, of making a shorter and cheaper route. All that can be claimed is, that the road already located, in pursuance of such a contract, shall be continued, with such facilities for travel and transportation of goods as may be necessary for the business of that route.

For complainants, *Messrs. P. B. Wilcox, Worcester*, of Huron county, and *C. K. Watson*, of Tiffin.

For defendants, *Messrs. Store*, of Sandusky, and *Odlin*, of Dayton.

The facts of this case are sufficiently set forth in the preceding case, and in the opinion of the court, which was delivered by Mr. Justice CORWIN. This case is brought before me on a motion of the Mad River and Lake Erie Railroad company to dissolve an injunction, granted herein, at the recent term of the district court; and the first question presented for consideration, is one of jurisdiction.

In completing the organization of the new judicial system of Ohio, very many questions of jurisdiction will naturally arise; and they are interesting and important, as settling the powers and capacities of the different courts, and the judges thereof respectively, as they are derived from the constitution and from legislation. Upon examination of the several laws in force upon the subject, and upon consideration of the comments of learned counsel thereon, I am satisfied that either one of the judges of the supreme court of Ohio has jurisdiction to entertain this motion, in vacation of the court in which the case is pending.

The 3d section of "an act to amend the several acts directing the mode of proceeding in chancery," passed March 22, 1850, 48 O. Laws, 33, Curwen's Revised Statutes, chap. 974, provides:

"That any judge of the supreme court, any president judge of the court of common pleas within his circuit, the judges of the superior and commercial courts of Cincinnati, and the superior court of Cleveland, within their respective counties, may grant injunctions and appoint receivers, in vacation, upon proper application as fully as their courts respectively, could do in session; and upon the like application and coming in of answers (due notice thereof, in writing having been given to the parties complainant), may dissolve injunctions and vacate receiverships
401 as fully as their courts respectively, could do in session: provided, however, that all such orders made in vacation, shall be properly written out, attested by the judge making the same, and be filed in the proper clerk's office as a part of the proceedings, to be recorded."

Formerly an injunction was regarded as an extraordinary writ, only granted under extraordinary circumstances, and for extraordinary reasons; but as it is one of the highest powers which can be exercised by any court, the very great advantages resulting to the party who ob-

tains it, have made it a common and familiar remedy. A preliminary injunction is entirely *ex parte*, and is always allowed only until the parties can be further heard; and the very great hardship and oppression which frequently resulted from the long continuance of an injunction, after the party against whom it was allowed, was prepared to show good cause for its dissolution, induced the legislature, very properly, to provide, as in the section of the statute above quoted, for its dissolution in vacation, upon proper application. The power clearly existed with the judges of the courts under the old constitution; and in order that it might not be lost, but should still exist, and be exercised by the judges of the courts under the new constitution, the legislature provided, by the first section of the act of April 30, 1852 (Curwen's Revised Statutes, chapter 1133, section 1):

"That all process and remedies authorized by the laws of this state, when the present constitution took effect, may be had and resorted to, in the courts of the proper jurisdiction, under the present constitution; and all the laws regulating the practice of, and imposing duties on, or granting powers to, the supreme court, or any judge thereof, and the courts of common pleas or any judge thereof, respectively, under the former constitution, except as to matters of probate jurisdiction, in force when the present constitution took effect, shall govern the practice of, and impose like duties upon the district courts, and courts of common pleas, and the judges thereof respectively, created by the present constitution, so far as such process, remedies and laws shall be applicable to said courts respectively, and to the judges thereof, and not inconsistent with the laws passed since the present constitution took effect."

All laws in force when the new constitution took effect, not inconsistent with its provisions, continued in force, and by the section above quoted, the powers and duties created and imposed by the act of March 22, 1850, are expressly conferred upon the present courts and their judges respectively. I agree that the injudicious exercise of this power 402 may lead to uncertainty and confusion in the administration of the law, but the existence of the power is one thing, and the occasion for its exercise quite another. When an injunction has been granted by a district court, or by the supreme court as such, certainly no one of its judges would interfere with that injunction except for very strong, cogent reasons; yet when such reasons do exist, and where the power with which the law has clothed him is invoked to prevent oppression and injustice, it is his plain duty to interfere; and no considerations of judicial courtesey will justify him in shrinking from the responsibility. I feel the more free to act upon this conclusion of my own mind because it is in consonance with the opinion of another member of the district court—the Hon. WILLIAM CALDWELL—for whose judgment upon any question I have the highest regard, and who in a recent controversy between the Marietta and Hillsboro Railroads pending in the district court for the fourth judicial circuit, fully maintained this jurisdiction. *Baldwin v. Hillsboro Railroads*, 10 Western Law Journal, 356. It is observable that this case is still pending in the district court for Huron county, and may or may not be taken to the supreme court at the pleasure of the parties. The order of reservation does not of itself transfer the case to the supreme court, and unless the papers are filed there by one of the parties and the cause docketed, the order of reservation is vacated and the case stands for hearing in the district court as though no order of reservation had been made.

I very fully concur with the district court in the opinion that the Mad River and Lake Erie Railroad company under its original act of incorporation, had no power to change its line of road after it was located or to make a new and different location; the power to locate was exhausted by the location, as was settled in the case of *Morehead v. The Little Miami Railroad Company*, 17 Ohio R., 340. But the 25th section of the original charter provides that "the right to alter and amend this act, whenever the legislature shall deem the same expedient and proper, is hereby reserved to the state." And if the legislature in the exercise of its authority has so altered and amended the original charter, as to authorize a change of the old route or the selection of a new and additional route, it is not necessary to go to the original charter to look for the power, nor is it important to inquire whether the original power of location has been exhausted. The third section of the amendatory act, passed March 17, 1838 (Ohio Local Laws, volume 36, page 393,) provides, that:

"If the said corporation find any obstacle to continuing the location of their railway on any selected route, either by the difficulty of construction, or procuring right of way, at reasonable cost, *or whenever*
403 *a better and cheaper route can be had*, it shall have authority to change the route and vary the location, adhering, however, to the several points named in the act to which this an amendment."

By the 10th section of "An act regulating railroad companies," passed February 11th, 1848 (46 Ohio Laws, 44; Curwen's Revised Statutes, chap. 817), it was provided:

"That whenever any railroad company, heretofore incorporated, or which may be incorporated, shall find it necessary, for the purpose of avoiding annoyance to public travel, or dangerous or difficult curves or grades, or unsafe or unsubstantial grounds or foundations, or for other reasonable causes, to change the location or grade of any portions of the road, whether heretofore made, or hereafter to be made, such railroad companies shall be, and is hereby authorized to make such changes of grade and location, not departing from the points and general route prescribed in the charter of such company; and for the purpose of making any such change in the location and grade of any such road as aforesaid, such company shall have all the rights, powers and privileges to enter upon and take and appropriate such lands, and make surveys necessary to effect such changes and grades, upon the same terms, and be subject to the same obligations, rules and regulations, as are prescribed in the ninth section of this act, and shall also be liable in damages when any have been caused by such change to the owner or owners of the lands upon which such lands was theretofore located, to be ascertained and reserved as aforesaid; but no damages shall be allowed unless claimed within thirty day after actual notice of such intended change shall be given to such owner or owners, if residing on the premises, or notice by publication in some newspaper in general circulation in the county, if non-resident; provided, however, that no such change of the location of the road be made, unless approved by the board of public works; and to enable the board of public works to act understandingly upon all such subjects, the said board of public works be, and is hereby directed to appoint, on the application of any railroad company desiring such change, a competent engineer of the railroad to examine the proposed new route and report the facts to the board of public works."

And the 11th section of the "Act to provide for the creation and regulation of incorporated companies in the state of Ohio," re-enacts, substantially, the above section, except that it makes no provision for the approval of the board of public works. 50 Laws, 276; Curwen's Revised Statutes, chapter 1196. The learned judge (HITCHCOCK) who granted the original injunction in this case was evidently of the opinion that the railroad company might acquire the right to change the location of its road, notwithstanding no such power was contained in the original charter; for it is a part of the allowance that the injunction shall "be continued until further order, or until the said railroad company shall, in pursuance of the law in such cases made and provided, acquire the legal right to change the present location of the said railroad." 404

The route which the Mad River and Lake Erie Railroad have been enjoined from using, not only "adheres to the several points named" in the original act of incorporation, but is so far "better and cheaper a route" as to prove either gross ignorance and carelessness, or positive fraud, in the location of the old route north of the city of Tiffin. And I can see no reason why the defendants have not complete authority, under the provisions of the several laws above quoted, to change the location of their road, at any point, upon the conditions and under the restrictions therein specified, unless the disability arises from some contract with the complainants, by which they have surrendered the power thus conferred upon them.

It is contended, however, that a charter, as between those associated under it, is the contract of the parties, and that it cannot be amended or extended, without the consent of each member of the association. And the first part of the proposition is undoubtedly true, but the second is subject to many qualifications. It is true that the charter of a corporation serves the same purpose among its members as articles of association do with partnerships and joint stock companies; and that no portion of its members can alter it without the consent of the others, *except as may be provided in the charter or articles of association*, or unless the amendment be to extend its privileges and increase its facilities for business within the scope of the original objects of the company, and evidently for its benefit and advantage. Can any one doubt that a particular power may be exercised upon the vote of a majority, or other number, if the original charter so provide? Is it any more doubtful that the corporation, as such, may accept an amendment which is clearly provided for in the charter? The provisions of the twenty-fifth section, for a subsequent alteration or amendment of the charter, at the pleasure of the legislature, were as much part of the terms of complainant's contract, where they became subscribers of stock, as any other of its provisions; and complainants have no right as stockholders, to deny the power conferred by the amendment, or interfere with its exercise, unless the means of the company are being squandered, or appropriated to purposes foreign to the original objects of the association.

But the Mad River and Lake Erie Railroad company, in their answer to the supplemental bill, deny that they have changed the route of their road, disavow their intention of doing so, or of abandoning the line of road originally established north of Tiffin. And the answer upon this point is well sustained by the proofs in the case, many of which have been prepared and filed since the hearing in the district court. They claim, however, the right to use as an additional route the line of road 405

between Tiffin and Sandusky City, constructed by the Sandusky City and Indiana Railroad company. Predicating the right upon a lease from said last named company, upon the 24th section of the original charter, which is in these words :

Sec. 24. "That full right and privileges are hereby reserved to the state, or the citizens thereof, or any company hereafter to be incorporated under the authority of this state, to connect with the road hereby provided for, any other railroad, leading from the main route to any part or parts of this state; *provided*, that in forming such connection no injury shall be done to the works of the company hereby incorporated; and the right and privilege is hereby reserved."

And also upon the 24th section of the general incorporation law of May 1, 1852 (Curwen's Revised Statutes, chap. 1196), which provides that :

"Any railroad company heretofore or hereafter incorporated, may, at any time, by means of subscription to the capital of any other company, or otherwise, aid such company in the construction of its railroad, for the purpose of forming a connection of said last mentioned road with a road owned by the company furnishing said aid; or any railroad company organized in pursuance of law, may lease or purchase any part or all of any railroad constructed by any other company, if said companies' lines of said road are continuous or connected as aforesaid, upon such terms and conditions as may be agreed on between said companies respectively; or any two or more railroad companies whose lines are so connected, may enter into any arrangement for their common benefit, consistent with and calculated to promote the objects for which they were created: provided, that no such aid shall be furnished, nor any purchase, lease or arrangement perfected, until a meeting of the stockholders of each of said companies shall have been called by the directors thereof, at such time and place, and in such manner as they shall designate, and the holders of at least two-thirds of the stock of such company represented at such meeting, in person or by proxy, and voting thereat shall have assented thereto."

406 These provisions would seem very clearly to confer upon these two railroad companies the right of connection with each other; and to give to either the right to aid the other in the construction of its railroad, for the purpose of forming such connections as well as to lease or purchase the line of road so constructed and connected. But it is objected that the Sandusky City and Indiana Railroad company was only a nominal organization, under its charter, by the officers and friends of the Mad River and Lake Erie Railroad company; and that the provisions of the law were only intended for railroad companies organized *bona fide*. To this, however, it may be well answered, that the complainants have made the Sandusky City and Indiana Railroad company, by its corporate name, a party defendant to this proceeding, and they are estopped in this suit from denying the corporate existence of said company. *The People v. The Rensaleer & Saratoga Railroad Company*, 15 Wendell Rep., 128, 129.

Aside from this consideration I am free to say, that although it appears that the charter of the Sandusky City and Indiana Railroad company was originally obtained with a sincere intention to construct a line of railroad from Sandusky City to the state of Indiana, yet, I am satisfied, from the proofs in the case, that some of the officers of the Mad River and Lake Erie Railroad company, with others, have associated under that

charter, with the main view of establishing a connection with their line of railroad at Tiffin, and thereby to secure a cheaper and better route from Tiffi to Sandusky City. The Mad River and Lake Erie railroad company, in its corporate capacity, has had nothing to do with the construction of the new road. It has been constructed by the Sandusky City and Indiana Railroad company, and they have thus established a shorter, cheaper and better route from Tiffin to the lake, avoiding steep grades, increased distance, difficulties as to water, ballasting, etc.; and if the Mad River and Lake Erie Railroad company have secured it, by lease, they have only done what they were clearly authorized to do by law, and what is not only promotive of the interests of the company but of the interests and convenience of the public. And while it is the highest duty of a court to protect the rights of a citizen against the encroachments of a corporation or of the whole public combined, yet a railroad corporation is essentially a public institution, created and continued solely upon the idea of its public utility, and never legitimately created for merely private ends; and there are connected with this case paramount considerations of public policy which cannot be disregarded. It cannot be that because com- 407 plainants have contracted with this company for the right of a warehouse connection at Bellevue, that the company are not only bound to continue their road through the town of Bellevue, for all time to come, but that they are also disabled from constructing any other road, or from accommodating the public with any other means of travel than through the town of Bellevue. This would be giving a broad interpretation, indeed, to the contract of the parties; and especially so when it is remembered that the corporation was created solely for the public use, and by the terms of its act of incorporation continually subject to public control.

There is no just or fair construction of the contracts set up by the complainants, which will give them a right to claim more than a continuance of the road in their locality with such facilities for travel and transportation of freight as may be necessary for the business on that route, and this, I think, should be secured to them until the final disposition of this controversy by the supreme court. I therefore make the following order to be entered on record in the district court of Huron county :

ORDER.

On motion of the defendants, and upon consideration of the original pleadings, exhibits and proofs, and of the depositions and affidavits filed since the granting of the injunction herein by said district court, and of the several reports of the special master hereinbefore appointed, and the arguments of counsel, it is ordered that said injunction be, and the same is hereby dissolved.

And upon motion of complainants, it is ordered that the said Mad River and Lake Erie Railroad company be, and they are hereby enjoined from withdrawing from the original line of their said road between Tiffin, in Seneca county, and Sandusky City, in Erie county, passing through the town of Bellevue, any of the engines, cars, furniture, equipments and force necessary for the convenient accommodation of travelers and transportation of freight upon said original route north of Tiffin.

408

CRIMINAL LAW.

[In the Licking County, Ohio, Court of Common Pleas, April Term, 1853.]

Before Mr. Justice Hurd.

THE STATE OF OHIO v. MCCORMICK AND OTHERS.

Indictment—Duplicity—Riot—Assault and battery.

The defendants were indicted for riot, under the act of March 8, 1831, Curwen's Revised Statutes, chapter 1347, section 5: "That if three or more persons shall assemble together, with intent to do any unlawful act with force and violence, against the person or property of another, or to do any unlawful act against the peace; or, being lawfully assembled, shall agree with each other to do any unlawful act, as aforesaid, and shall make any movement or preparation therefor, the persons so offending shall, " etc.

The indictment contained two counts—First, that the defendants assembled together with intent to assault one Smith, and in pursuance of such intent, did then and there assault, beat and wound him, the said Smith, and other wrongs then and there did. Second, that the defendants being lawfully assembled, did agree, etc., to assault said Smith, and in pursuance of such agreement did then and there assault, beat and wound him, the said Smith.

Upon motion to quash, the court held both counts bad for duplicity, in this—that the unlawful act against the person of said Smith, and against the peace, committed, as alleged in the indictment, by the defendant, and as constituting their movements, or preparations to carry out their riotous intentions or agreement, amounts to another and distinct offense of assault and battery; and the defendants could not be lawfully convicted upon said indictment for either a riot or assault and battery.

409

CRIMINAL LAW.

[In the Licking County, Ohio, Court of Common Pleas, October Term, 1852.]

Before Mr. Justice Hurd.

THE STATE OF OHIO v. ELLIOTT.

Indorsement upon indictment—Special plea—Onus probandi.

The defendant was indicted for an assault and battery, under the act of March, 8, 1831, Curwen's Revised Statutes, chapter 1347. By the 55th section of that act it is provided, "that no bill of indictment for an offense, specified in this act, shall be found a true bill by any grand jury, unless the name of the prosecutor be indorsed thereon, except such bill be found upon testimony sworn and sent to the grand jury, by order of the court, at the request of the prosecuting attorney, or the foreman of the grand jury; in which case, the fact that the bill was found upon testimony sworn, and sent to the grand jury by order of the court, shall be indorsed on the bill, instead of indorsing the name of the prosecutor." This indictment was returned by the grand jury, signed by their fore-

man, "a true bill," and indorsed, "this indictment found on the testimony of witnesses, sworn and sent to the grand jury by order of the court."

The defendant plead specially, "that the indictment was not indorsed by the name of any prosecutor, nor found upon testimony sworn and sent to said grand jury, by order of said court, at the request either of said prosecuting attorney, or the foreman of said grand jury."

To this plea there was a demurrer, which the court overruled. The prosecution replied, taking issue upon said plea, "that said indictment was found upon testimony sworn and sent to the grand jury by order of the court, at the request of the prosecuting attorney."

To try this issue a jury was empaneled and sworn. The counsel for the defendant claimed that the affirmative of the issue being with the state, the prosecution must show the facts denied by the plea.

For the state it was claimed that by the indictment itself, and the indorsements thereon, the affirmative of the issue was *prima facie* established, and that the defendant under this plea must, to avail anything, rebut this presumption, and cited Roscoe's Criminal Evidence, 71; 410 1 Pickering, 375; 11 Johnson, 513; 19 Johnson, 345.

The court held the *onus* to be upon the state, and must be by proof *aliunde*. The state then proved by the prosecuting witness, that he had been subpoenaed to give evidence before the grand jury, and was sworn by the clerk of said court, and give testimony before the grand jury upon this case, but did not recollect whether he was sworn in the presence of the court, or in open court, or in the clerk's office adjoining the court room. The state there rested. The defendant offered no testimony. Thereupon the court instructed the jury: First, That the state must show by proof aside from the indictment and indorsement, that it was found upon testimony sworn and sent to the grand jury by order of the court, at the request of the prosecuting attorney, or foreman of the grand jury. Second, That the issuing of the subpoena, and swearing of the witnesses, at the request of the prosecuting attorney, of itself did not show that such testimony had been sent to the grand jury by order of the court, unless the witness had been sworn in presence of the court, and in open court.

Verdict for defendant.

NEGOTIABLE NOTES.

[In the Court of Common Pleas, Athens County, Ohio, April Term, 1853.]

PUTNAM V. STEWART.

[Reported by Mr. Justice NASH.]

Sealed bills require indorsement under the Ohio statute.

A note under seal, payable to one, or bearer, is not negotiable by delivery; but only by indorsement thereon. It is other with a promissory note not under seal.

The case was debt on a note under seal, dated November 8, 1849, for \$175, and payable in one year to Frederick A. Lee or bearer.

Mr. Brown, for the Plaintiff, offered the note in evidence, and rested his case.

Mr. Welch, for the Defendant, moved for a nonsuit, because the note had never been indorsed by said Lee to the plaintiff.

411 NASH, J. The motion made in this case must prevail. This is a note under seal, and is not negotiable, either at common law, or by the law merchant. At common law no chose in action was transferable so as to enable another than the obligee or payee to maintain a suit in his own name. The law merchant is confined to mercantile paper, and promissory notes not under seal, and has no reference to an instrument or promise under seal. These propositions are too plain and familiar to need a citation of authorities. This note under seal, then, is not negotiable, by delivery, or even by indorsement at common law.

Our statute in relation to negotiable instruments provides that any promissory note, bond, etc., payable to order, assigns or bearer, may be negotiated by indorsement. This statute makes such a sealed bill, as this, negotiable by indorsement thereon. But there is no indorsement on this note; it had been passed by mere delivery; and a mere delivery will not, either at common law, or by our statute, vest the legal title to the instrument in an assignee.

This identical question was presented to the supreme court on the circuit in the county of Gallia, some years since in the case of *Moxon v. Morgon*, and the court ruled that a note under seal, payable to one, or bearer, was negotiable only by indorsement thereon. Since that decision, the question has, in this portion of Ohio, been considered as settled, and settled, too, I have no doubt, correctly.

Nonsuit ordered.

416

TELEGRAPH COMPANY.

[Court of Common Pleas, Cuyahoga County, Ohio, May Term, 1853.]

Before Mr. Justice Starkweather.

BOWEN & MCNAMEE V. LAKE ERIE TELEGRAPH COMPANY.

Liability of telegraph companies for mistakes in messages.

This was an action brought by the plaintiffs to recover of the defendants, damages sustained by reason of a mistake in the transmission of a telegraphic despatch sent over the line of the defendants, from Monroe, Michigan, to Buffalo, New York, November 25th, 1850. The despatch was as follows:

"Send one handsome eight dollar blue and orange, and twenty-four red and green, three twenty-fives, Bay State. Fill former orders with best high colors you can.

"BIDWELL & Co., Adrian, Michigan.

"To Bowen & McNamee, New York."

The proof was that the despatch, when it reached New York, read "one hundred instead of "one handsome," and that the mistake complained of, occurred in some office upon the defendant's line. That the plaintiffs, after having had the despatch repeated (how far back did not appear), and receiving it a second time, "one hundred," shipped to Bidwell & Co., "one hundred eight dollar blue and orange Bay State" shawls: that the shawls were returned, and reached New York after the shawl season had closed; by reason of which they were depreciated in value.

The plaintiffs claimed to recover charges for freight and the depreciation in value.

The defendants denied the commission of the error, and claimed that the despatch was so obscure as to be inappreciable, and not, therefore, the subject matter of damages, even if the error had been made; that telegraph companies were not held to the same accountability as common carriers, and that such errors as the one complained of might occur without gross negligence. 416

The cause was argued to the jury by *Mr. William Slade, Jr.*, for the plaintiffs, and *Mr. John A. Foot*, for the defendants.

Mr. Justice STARKWEATHER, charged the jury in substance that telegraph companies, holding themselves out to transmit despatches correctly, were under obligation so to do, unless prevented by causes over which they had no control; that the defendant was bound to send the message in question correctly, and that if it failed in this duty, whereby damage had occurred to the plaintiffs, the plaintiffs must recover. That if the message was originally so obscure as to be inappreciable, that then the error complained of could not have increased its obscurity, and the plaintiffs could not recover; but if it was sufficiently plain to be understood by business men, and those possessing ordinary capacity, that it was appreciable, and if changed to the injury of the plaintiffs, was the proper subject matter of damages.

All these questions were for the jury upon the evidence in the case.

The jury returned a verdict for the plaintiffs for one hundred and eighteen dollars. •

CONTRACTS.

462

[In the Court of Common Pleas of Crawford County, Ohio, June Term, 1851.]

Before Messrs. Justices Bowen, Musgrave, Lee and Stewart.

WINTERHALTER V. JOHNSON AND OTHERS.

Entire contracts—Hiring by the year at so much a month.

When a hiring is for the year, at a specified sum per month, the laborer is entitled to be paid his wages at the expiration of each month as the service is performed, although he has abandoned the service before the year expires; and in order to enable him to maintain suit therefor, it is not necessary that he should work for the whole year, as a condition precedent to being paid.

Johnson & Bennett were partners, carrying on a steam saw mill. The plaintiff applied to them for employment, saying that he did not want to hire unless he could engage for a year. They offered him for that period, first, twenty-four dollars a month, with his house rent and cow pasture free; or second, twenty-six dollars a month, without house rent and cow pasture. He accepted the first proposition, and commenced work under it about the middle of January, 1850, and continued till the first of May, 1850, when the firm of Johnson & Bennett dissolved, and the mill passed into the hands of the defendants, and was continued in operation without interruption by the change. On the day J. & B. dissolved, the defendants told the plaintiff they wished him to 463

continue on working at the mill under the arrangement made with Johnson & Bennett, to which the plaintiff assented. His employment was to tend the fires and keep the engine running. He continued till about the first of October, 1850, and then left without the consent of the defendants. The house rent and cow pasture had been furnished according to the contract.

Upon these facts being proved, the defendants asked the court to charge the jury :

First, That if they should find from the evidence that the plaintiff was engaged to work for the defendants for a year, or any other specified period, at the rate of twenty-four dollars a month, with house rent and cow pasture found, and that the plaintiff of his own will, without the consent of the defendants, or a breach of the contract on their part, abandoned the service before the expiration of the specified period, the plaintiff could not maintain this suit.

Second, That an agreement to work for a year, at the rate of a specified sum by the month, is an entire contract, which must be fully performed by the party hired working the whole year, before he can sue and recover for any service rendered by him under the agreement.

The court refused to give these instructions, but charged the jury :

"That if they should find from the evidence, that the labor mentioned in the plaintiff's declaration was performed under an agreement between the plaintiff and the defendants, that the plaintiff should work for the defendants for a year at the rate of twenty-four dollars a month, with house rent and cow pasture found, the plaintiff is entitled to receive his wages at the expiration of each month, as the service was performed, and that in order to entitle him to maintain suit therefor, it was not necessary that he should work for the defendants the whole of said year, unless the agreement was that the plaintiff should work the whole year as a condition precedent to being paid." Verdict for the plaintiff.

Mr. Stephen R. Harris, for Plaintiff.

Mr. Franklin Adams, for Defendants.

484

NOTE BY THE EDITORS.

A similar case was decided in 1849, in the Montgomery county, Ohio, supreme court, by Mr. Chief Justice HITCHCOCK.

A journeyman tailor was employed by a shopkeeper to work at coat making "for the season," at so much a piece. A pass book was sent in with the work when it was done, in which the employer entered the amount due for it to the credit of the workman. The workman left his employment before "the season" was over, and the court held that the contract entitled the workman to demand pay for each piece as it was finished, and that it was no defense to the action that the workman had abandoned his employer's service before the expiration of the season.

This complicated question is very ably discussed in the notes to *Cutter v Powell*, 2 Smith's Leading Cases, 1.

INSURANCE.

466

[In the District Court of Ohio, Washington County, April Term, 1853.]

Before Messrs. Justices Caldwell, Nash, Peck and Whitman.

THE OHIO MUTUAL INSURANCE COMPANY V. MARIETTA WOOLEN
FACTORY.

[Reported by MR. JUSTICE NASH.]

Insurance—Assessments—Mutual insurance.

Where the charter of an insurance company made the exhausting a certain fund a condition precedent to the making of an assessment on the notes of members, it was held that an assessment made without having first exhausted this fund, was void.

Where a particular fact is made a condition to the right to exercise an authority or execute a power, an execution of the power, in the absence of the existence of this fact, is void—the *existence* of the power to act being dependent upon the existence of this particular fact.

A statute is to be so construed as to lead to just results, unless the language compels to a different construction.

The charter of a mutual insurance company ought, if possible, to be so construed as to equalize the burdens and benefits of membership among all its members.

By the charter of the Ohio Mutual Insurance company, and the acts amendatory thereto, the premiums received on the policies issued on the pay principle, are to be so applied that members will be made liable for losses occurring in the pay department only to the extent that the losses shall exceed the premiums received in that department during the time they are members.

Where the directors had applied all the premiums received on pay policies on and after the 14th May, 1851, to losses occurring prior to that date, and then assessed the notes of those who continued or became members on and after that date, to an amount equal to the entire losses occurring after that date, it was held, that such an application of these premiums was illegal and void; and that an assessment made in consequence of such an exhaustion of this fund, was also void.

This cause came up on appeal, and was submitted to the court. The action was assumpsit to recover the amount of a note, dated May 14, 1851, for \$1,375.00, given by defendant as the premium on a policy of insurance for \$2,500 on the factory building, etc., of defendant for one year, from and after said 14th day of May, 1851, and payable on 467 calls. The policy was issued from the mutual insurance department of the company. The declaration averred the execution of the policy and note, the occurrence of losses, the exhaustion of the cash fund, the making of an assessment, the notice and call for payment, and the refusal of defendant to pay, whereby the whole note became due at once.

The execution of the policy and note was admitted; and the only dispute in the case was, whether a legal assessment had been made. The evidence showed that the company closed business on the 1st of October, A. D. 1851—at least, no policies were issued after that date. The assessment for a refusal to pay which this suit was brought, was made of forty cents on the dollar, to cover losses occurring between May 21st, 1851, and October 1st, 1851. Other assessments were made afterwards, amounting in all to near eighty per cent. on the premium notes, to meet losses, occurring between the same dates.

The cash fund had all been exhausted before this assessment was made, but it had all been applied to cover losses arising prior to the 14th day of May, 1851, when the note in suit was executed, and from which time the policy took effect. The entire amount of premiums received, both on cash and mutual policies, after the 14th of May, and up to October, A. D. 1851, had thus been applied to pay losses which had happened before the defendant's policy had been executed, by virtue of which the defendant alone became a member of the company.

It was further proved, that a policy on the property covered by the defendant's policy for the same period, would have been issued on the cash and pay principle at a premium of two and three-fourths per cent. on the amount insured.

This company was chartered March 11, 1843 (41 O. L. L., 178), as a mutual fire insurance company, and with the usual powers granted to such companies. Section 2: Every person, by insuring in the company, became a member thereof for the time specified in the policy. Section 6: Every member was to deposit his note for the premium on his policy, and pay a sum, not exceeding ten per cent., thereon in cash at the same time; and this money is appropriated to the discharge of incidental expenses, and to form a cash fund to meet losses promptly; and said note is to be given up after the expiration of the policy, after deducting all losses and expenses occurring during the term of the policy. Section 7: Every member is bound to pay his proportion of all losses and expenses happening or accruing in or to said company, and a lien
468 to secure the payment of these sums is given on the property insured. Section 8 provides the method for adjusting any loss. Section 9 provides that when the amount of a loss is adjusted, the directors shall determine the amount or rate of the assessment, to which the members are liable, as their respective shares or portion of such loss.

This charter was amended by the act of March 12, 1844, 42 Ohio L. L., 213. By the first section of this act, the company is authorized to issue policies on the pay and cash principle; and the persons so insured were to be liable only to the extent of the premium paid, and not for any sum beyond the amount of premium thus originally paid. The second section provides that the money so paid shall be retained as a fund for the payment of losses and expenses, which may happen or accrue in and to said company; and which said fund shall be exhausted before a resort shall be had to assessments upon premium notes, and the fund and the premium notes are constituted the capital of the company for the payment of losses and expenses; but no member is to be liable to a greater amount than his premium note.

In A. D. 1845 this charter was again amended by the act of February 25, 1845—43 O. L. L., 130. This act allows the company to engage in life and marine insurance, insurance on goods in course of transportation, whether on land or water, and in the loan of money on *bottomry* and *respondentia*, etc.

The charter was again amended by the act of December 30, 1845—44 O. L. L., 12. The act changes the name to that of Ohio Mutual Insurance company, and provides that the accounts of the life, marine, and fire department shall be kept separate, and parties insured in one department shall not be liable for losses or risks in the other.

The act of March 29, 1850 (48 O. L. L., 496), provides for the formation of a capital of not less than \$100,000, and not exceeding

\$200,000. This capital stock, together with the notes, bonds, mortgages, and all other securities acquired under this act, are declared to be pledged to the fulfilment of the contracts and obligations of the company. The company is authorized to declare dividends out of any accumulated profits, but so as not to reduce, lessen, or impair the capital stock.

Mr. Justice NASH. This cause was argued on the first day of the term, in the absence of the presiding judge, and has been carefully considered by those of us who heard the argument, and though the whole court is not entirely agreed, yet a majority of us, and those who 469 heard the argument in the case, have come to a conclusion satisfactory to our own minds, and which conclusion I will now proceed to state.

The sole question involved in the case relates to the character of the assessment; if that was a legal assessment, then it is admitted that the plaintiff is entitled to a judgment for the amount of the note; but it is claimed by the defendant that the assessment is void, for reasons which I will hereafter state. The plaintiff, however, claims that this court cannot go behind these assessments; that the directors are to adjust the losses, and fix the rate of the assessment, to which members are liable. This position is correct so far as it relates to the settling of the *amount* of a loss, and the mere calculation of the amount to be paid by each member; but this cannot apply to a case, where the contingency has not occurred, which authorizes the board of directors to make such assessment. The one presents a case of the absence or the want of power to act; and the other, only the question as to the proper exercise of an acknowledged power. Where there is no power to act, there can be no legal action. If, in this case, the charter has made the existence of some fact a condition precedent to the right to make an assessment, then we are all clear that the existence of this fact is essential to the power, or the exercise of the power, to make an assessment. There are then two questions involved in the case: First, does the charter create any fact a condition precedent to the right to make an assessment? and secondly, if it does create such condition precedent, has its existence been shown by the evidence in this case?

And first, is any fact made by this charter a condition, without the existence of which no assessment can rightfully be made? The second section of the act of March 12, 1844 (42 O. L. L., 213), enacts that the fund therein provided for shall be exhausted before a resort shall be had to assessments upon premium notes deposited with the company. The language of this section would seem to be peremptory, that no power to make assessments can exist until this fund should be exhausted. That fund must be first applied to pay all losses, and the persons liable on premium notes are only to be called upon for contributions when the fund shall have been so first applied; the liability to contribution by the members is made to depend upon this condition—the exhaustion of this fund.

Nor is the language of the section more decisive than is the manifest scope and object of this whole amendatory act. By this act, the cash principle of insurance was engrafted upon this charter for mutual insurance. The losses arising on policies, issued on the cash principle, were, in the first place, to be met by the premiums received on 470 the same; if the profits exceeded these losses, then they might be applied to the payment of any losses on policies issued on the mutual principle;

and, in this way, members had a chance of being relieved from all assessment on their notes. If, however, the losses in the cash department should exceed the amount of premiums received, then the notes, given on the issue of policies in the mutual department, would become liable to contribution to an extent sufficient to make up this deficiency in the cash premiums to meet losses on cash policies. This whole scheme clearly looks to these notes of members as a security to be resorted to only on a failure of this cash fund so raised; and hence this exhaustion of the cash fund is clearly a condition precedent to the existence of the right or power to make any calls or assessments on members by reason of the notes by them deposited with the company. We are all, therefore, clearly of the opinion that, until this fund is exhausted, there is no power to make any assessment; and that it is incumbent on the plaintiff to show that this contingency has arisen—that this fund has been legally exhausted—before there is any ground made of a right to recover. In other words, if this condition has not been complied with, then there was no capacity, no power, in the board of directors to act in the matter; and no power to act, and no assessment are equivalent terms; action without power to act is just equivalent to no action at all.

The next inquiry presented in this case is, has the cash fund been exhausted? And it is on this part of the case that his Honor, Judge CALDWELL, is unable to acquiesce in the conclusion to which the rest of our minds have come. It is a question full of difficulty, and the majority of the court have come to their present conclusion, not without much care and reflection. When this case was in the common pleas, I could not see my way clear, and therefore decided the case the reverse of what it is now to be decided; still further reflection has entirely satisfied my mind with the correctness of our present conclusion; and I will now proceed to develop the reasons which have led our minds to the opinion, that the evidence in this case shows that this cash fund has not been *legally* exhausted, when this assessment was made.

In construing this charter, and the amendments to the same, we must keep constantly in mind its two-fold character. In its origin, it was simply a mutual insurance company; but the act of March 12, 1844, engrafted upon this company the power to insure on the cash principle.

471 This company then had a two-fold character—a double capacity—the powers of two distinct classes of insurance. While the power was granted, no cash capital was provided as a security for losses occurring in the cash department over and above the premiums which might be received. To meet this necessity, the notes of members insured in the mutual department, were declared, along with these premiums, to constitute the *capital* of the company for the payment of losses and expenses. Here, then, was a new liability cast upon the members of the company—or, which is the same thing, upon those who might insure in the mutual department; they were now rendered liable, not only for losses arising from the destruction of property covered by mutual policies, but also for any losses arising in the cash department, over and above the premiums received on policies issued on the cash and pay principle.

In order to justify this additional liability, there must have been some expected benefit, advantage, or profits incident to it; this advantage was undoubtedly expected to be found in a receipt of the usual profits incident to such insurance. Ordinary experience has shown, that the principle of cash insurance is that of fixing the rate of premium so high

that the premiums received will exceed the losses, which, experience shows, will probably occur. It is an application of the doctrine of chances, or probabilities, as settled by a long and large induction of individual cases, deriving therefrom the probable proportion between the amount insured and the annual losses thereon. If this proposition can be ascertained, then the business of insurance is as certain in its results as any other. It had been supposed that this ratio had been ascertained, and that profit, therefore, must result from any well-managed business of insurance on the pay principle. Influenced by this consideration, the managers of this company undertook to render a mutual insurance business profitable to those insuring in it. Profit, it was argued, can be made in the cash department; and this profit will not only relieve the members from all assessment on account of losses in the mutual department, but will also afford profits, for a division of which provision is made in one of these acts. Here, then, in this *probability* of profits arising from the pay department, is found a compensation for assuming the burdens arising from the *possibility* of losses in the same. This was the inducement which must have influenced persons in becoming members under this increased liability. A person who became a member of this company, had a right to assume two things: *first*, that if the pay department should prove profitable, he was to receive a benefit from it; *secondly*, that if it proved unprofitable, he would be liable to contribution only to the extent of meeting the excess of the losses over premiums. He never could have anticipated the contingency when he should 472 be liable for all the losses occurring in the pay department, undiminished by the premiums received during the time he was a member. Such, in the opinion of a majority of the court, is the true scope, and policy, and object of, and inducement to, the passage of the act of 1844; nor do we find anything in the letter of the act inconsistent with this view of it.

Let us apply the principle here laid down with the evidence in this case. When this company closed its business in October, A. D. 1851, it applied all the premiums received between the 14th of May, A. D. 1851, and the time of closing its business on the pay policies, to the payment of losses occurring prior to the said 14th day of May. All losses up to that date were thus paid; and those becoming members on or after the said 14th day of May, were left to pay in full all losses occurring in the pay department as well as the mutual, undiminished by any premiums received on pay policies during that time; while those who became members prior to that date, had their liabilities diminished, not only by the premiums received prior to that date, but also by all premiums received between the 14th of May and the 1st of October. The liability of the one class of members was increased just as that of the other was diminished; and what the one had a right to expect would diminish their liability, was applied to diminish the liability of other members, for losses arising before they had become members. This result could never have been anticipated; its possibility never have been imagined.

If we are right in our view of this act, this fund has not been exhausted—it has been misapplied; but this misapplication cannot authorize the directors to make an assessment, when by the terms of the charter they had no power to do it. The misjudgment, or the misconduct, of the directors cannot increase the legal liabilities of this defendant, and of others similarly situated. His and their liability is limited and fixed by this same charter, and can be legally neither increased nor diminished by the acts of the directors. They are mere trustees to adjust these

losses upon the members according to what are their legal liabilities under the charter; the power of the directors has this extent and no more. When they undertake to change this liability, they are simply acting beyond the scope of their authority, and their acts are void. If these directors have misapplied these funds to the injury of those sustaining losses subsequent to the 14th day of May, those thus injured undoubtedly have a right of action against them to the extent of this injury; while 473 the directors may indemnify themselves by readjusting this assessment according to the true meaning of the charter, and compelling those who were members prior to the 14th of May to pay an amount on losses occurring before that time sufficient to meet the sum thus misapplied to their benefit, as this misapplication of the funds can no more *diminish* their liabilities than it can increase those of the others.

But it is said that this cash fund is a fund created to meet losses as they may arise, without any regard to when the money was received, or the loss occurred; and hence that before a call or assessment can be made, the whole fund must be applied to meet all losses as far as it will go, and then the assessments must be made to meet all losses not so paid, and made, too, on those only who were members at the time these unpaid losses occurred. If such is the language of the act, the court must carry it out, however inequitable it may be, since parties are supposed to enter into such contracts, with a full knowledge of the law governing them. But is there anything in this act compelling the court to a construction of this charter so unjust and inequitable in its operation upon the liabilities of members?

Were the language of this act of 1844 like that contained in the original charter, in reference to the small cash fund there provided for, there might be some difficulty in the question. The sixth section of that act declares that the small per centage there required to be paid on premium notes shall *form a cash fund to meet losses promptly*. But there are no such words in this act of 1844; it simply provides that *such sum or sums of money as shall be paid to said company as aforesaid, shall be retained as a fund for the payment of losses and expenses which may happen or accrue in and to said company; which said fund shall be exhausted before a resort shall be had to assessments*. Here is nothing saying to *what* losses this fund shall be applied, nor that it shall be applied to meet losses promptly, but that it shall be exhausted in paying losses, before an assessment shall be resorted to. This language implies that the losses to be paid are losses for which parties may be assessed, but that this assessment shall be made only for the sum remaining unpaid after such fund shall have been all applied toward their payment. And when we consider that, by the one construction, equity, and fairness, and justice are secured between all the members of this company; while the other construction will lead to gross inequality and injustice between them, the court is bound, if the language of the charter does 474 not absolutely prohibit, to give it such a construction as will secure equality and justice between its members. Such, it appears to us, is the rule of construction by which we should be governed in ascertaining the meaning and scope of this amendatory act of 1844. BIRCHARD, J., in *Spicer v. Giselman*, 15 Ohio Reports, 338, 341, uses this language: "The first and all-important rule to be regarded in construing a statute, is to have respect to its spirit, rather than its letter. It is not to be supposed that the framers of a statute contemplated a violation of the plain rules of *natural justice*." In *The State v. White, Treasurer*, S. C., 17

Ohio Reports, 32, 34, the following language is held: "The natural force of words, when taken by themselves, is not always the true test in construing a statute. Words which, when thus taken, lead to *unjust results*, at war with general policy and with principles of justice, ought ever to be so construed as to effect the latter object, *just results* not at war with general policy and the principles of justice." These rules we believe to be sound ones, and directly applicable to a construction of the statute now under consideration, since the one construction leads to *unjust*, and the other to *just* results; the one makes the partnership among members *unequal*, the other makes it *equal*; the one equalizes the burdens and benefits of all the members, the other renders them unequal, increasing the liability of one class of members to the benefit of another. We are not permitted to presume that the legislature contemplated, much less designed, such a result among the members of this company; we therefore give to this act of 1844 such a construction as will equalize the burdens and the benefits among those becoming members—any other construction is not to be endured; it would be a libel upon the men who asked for its passage, as well as upon those who passed it.

There is still another result, following from any other construction, which probably ought not to be overlooked: If this fund is wholly in the discretion of the directors, then this state of case might legally occur. The company, being involved in large losses, might stop taking policies in the mutual department, while still pursuing the business of insuring in the pay department, and then apply these premiums to pay prior losses, and thus leave subsequent losses wholly unprovided for, since there would be no premium notes in existence, and no cash fund on hand, that having been applied to pay losses for which prior members were actually liable. Here, again, gross injustice would arise from giving to this charter the construction claimed by the plaintiff.

Before closing there is one other remark I cannot avoid making. The evidence shows that, on the pay principle, the premium chargeable on this policy of \$2,500 for one year, would have been two and three-fourths per cent., or only \$68.75; and yet a note for \$1,375 on this \$2,500 for one year is required on this mutual policy. Why is this exorbitant sum exacted? If the object was simply indemnity, why take a note in a sum so grossly excessive? The case, on the face of it, looks as though prior losses to a large amount existed, and a fund was to be raised to pay them. This could only be done by keeping up the cash department; to keep this up, public confidence must be gained, and this could only be done by showing a large amount of notes, liable as capital to all losses in this cash department. A large increase in the amount of the premium note would show this result, as it would show a capital nearly equal to the amount insured in the mutual department. Speaking for myself, I can see no other explanation for the extraordinary state of things appearing in this case; it is a matter, however, for the investigation of members, and one with which, in the absence of fraud, the court can have nothing to do.

Judgment was therefore rendered for the defendant.

Messrs. D. S. & W. S. Nye, for plaintiff.

Mr. C. B. Goddard, for defendant.

481

PRINCIPAL AND SURETY.

[In the Court of Common Pleas of Washington County, Ohio, May Term, 1853.]

Before Mr. Justice Nash.

J. STILL v. HARVEY HOLLAND, ISAAC WILSON AND N. P. EDWARDS.

[Reported by Mr. Justice NASH.]

Principal and surety—Partnership—Parties.

The relation of principal and surety on a contract may arise between parties after the making of the same.

Where, on the dissolution of a firm, one partner was to pay half of a debt, and a certain sum in addition; the other partner having paid his portion of the debt, was treated as a surety to the other as to the balance owed by him.

A partner who, after a dissolution, has paid his portion of a partnership debt, may, as a surety to his copartner, file a bill in chancery against his copartner, and the judgment creditor, (he having obtained a judgment against both,) to compel such copartner to pay the judgment; and persons indebted to such copartner may be joined in such bill, and compelled to pay the amounts owing by them on the judgment.

In such a bill the judgment creditor is an indispensable party.

Stump v. Rogers, 1 Ohio R., 533, and *McConnell v. Scott*, 15 Ohio R., 401, cited and applied.

The bill charges that the complainant, Still, and said respondent, Harvey Holland, were partners, and, while such, became liable on a note of about \$250 to one Horace Holland; that the firm was dissolved, and all debts paid, but the one to Horace Holland, and that, as to this, Harvey Holland was to pay one half of it, and fifty-five dollars over, for a wagon of the firm, which he took; the bill further charges that the complainant has paid his part of said note; but that said Harvey Holland has failed to pay either said fifty-five dollars, or his half of the balance; and that, on such default, said Horace Holland has obtained a judgment against the complainant, and said Harvey Holland, for the balance due
482 from said Harvey Holland on said note; the bill further charges that Harvey Holland has no property liable to execution, and that Wilson and Edwards are indebted to him; and the bill prays that said Wilson and Edwards may be decreed to pay what they owe to said Harvey Holland, in satisfaction of said judgment. The respondent demurred.

Messrs. Clark & Ewart, for Complainant.

Messrs. Whittlesey & Town, for Respondent.

Mr. Justice NASH. After the decisions of our supreme court, in the cases of *Stump v. Rogers*, 1 Ohio R., 533, and *McConnell v. Scott et al.*, 15 Ohio R., 401, there is but one question left open in the case for debate, and that is, whether the complainant, on these facts, is the *surety* of Harvey Holland. The above cases decide the right of a *surety*, in such a case, to file this bill.

Is, then, the complainant the surety of Harvey Holland? As between themselves there would seem to be no room for doubt; this money is due wholly from Holland; and, if the complainant is compelled to pay it, he will have a legal right against Holland to have the same repaid. Holland, then, owes this money, and is in equity bound to pay it; why then, is he not, to all intents and purposes, the principal, and the complainant the surety? The relation of principal and surety, at com-

mon law, does not affect the payee; as to him, all who promise are principal; this relation is one between the persons who promise.

Such being the case, the relation can be contracted at any time between the parties liable for a debt; as where one partner retires, and another continues the business, on an agreement to pay all existing liabilities of the firm. Such a contract creates between the parties the relation of principal and surety; and the rights growing out of it will be enforced in a court of chancery, *Bailey v. Inglee*, 2 Paige's Chancery R., 278. This relation need not necessarily exist at the making of a contract; it may grow up between parties subsequently. *Cornwell's Appeal*, 7 Watts & Serg., 305; *Bank of Limestone v. Penrick*, 2 Monroe R., 98; S. C., 5 Monroe, 25.

Still, thus being the security of Harvey Holland, has, under our decisions, a right to file this bill; but there is here a want of necessary parties. Horace Holland is not made a party to this bill. He is the judgment creditor; this money is to be paid to him to satisfy his judgment, and he ought, therefore, to be a party to the bill. The complainant may amend, in this respect, and the bill will then be sustained.

APPEALS.

496

[In the District Court of Ohio, Lawrence County, April Term, 1853.]

Before Messrs. Justices Caldwell, Peck, Whitman and Nash.

LITCH V. MARTIN.

[Reported by Mr. Justice NASH.]

Appeal erroneously dismissed, on mistake of fact, reinstated on motion.

Where, at the preceding term, the district court have improperly struck an appealed case from the docket, on the ground that no legal bond had been given; at a subsequent term, the same court, on motion, ordered the case to be redocketed, on it being made to appear that a legal bond had been in fact given.

At the last term of this court, this case, which was on appeal, was dismissed, on the ground that the court below had not fixed the amount of the appeal bond, the appeal having been taken by the plaintiff. The supreme court at its last term having decided that the failure of the court below to fix the penalty of the appeal bond, did not deprive the appellant of his right of appeal, a motion was now made to reinstate the case in this court. 496

Messrs. Leet & Hawley, for Plaintiff.

Mr. E. Nigh, for Defendant.

The opinion of the court was delivered by

Mr. Justice NASH. We have concluded to sustain this motion, and order this case to be again redocketed in this court. According to the decision of the supreme court, this court erred in dismissing the appeal, and the party is probably without remedy, unless the error can be corrected on motion. It may be doubtful whether error would lie, where no bill of exceptions was taken to the ruling of the court dismissing the appeal; but, if it would lie, this court will be doing only what the decision of the supreme court would require it to do. We, however, grant the motion as a convenient practice to remedy such an error, a remedy more convenient, and less expensive to all parties than any other.

501

CRIMINAL LAW.

[In the Court of Common Pleas of Athens County, Ohio, March Term, 1853.]

Before Mr. Justice Nash.

THE STATE OF OHIO V. JOHN CROW.

[Reported by Mr. Justice NASH.]

*Rape—Idiot—Insane—Construction of Curwen's Revised Statutes, pages 184, 185.*A female *idiot*, or an *insane female* may be the subject of a rape.

An assault with an intent to commit a rape may be committed on the person of an insane female, or a female idiot.

The crime of having carnal knowledge of an insane female, knowing her to be such, is consummated when the act is done knowingly with her acquiescence or consent.

The word *insane* in the sixth section of the act for punishment of crimes, Curwen's Revised Statutes, 184, 185, is used in its elementary and popular meaning, unsoundness of mind; and hence embraces the case of one's having carnal knowledge of a female idiot, knowing her to be such.

The defendant was indicted: 1. For having committed a rape on the person of Louisa Dowler; 2. For an assault with the intent to commit a rape on said Louisa, and 3, for having had carnal knowledge of said Louisa, she, said Louisa, being an insane woman, and he, said defendant, knowing her to be such. The defendant pleaded not guilty, and the cause was tried by a jury at the last March term of the common pleas.

The evidence on the trial proved that said Louisa Dowler was of unsound mind, and had been so from her nativity; though she was not so absolutely destitute of mind that she did not perform the necessary functions and calls of humanity; but that she had not mind enough to testify as a witness, or to be held legally responsible for her acts, whether civil or criminal.

The words of the statute are, "that if any male person, seventeen years old and upward, shall have carnal knowledge of any other woman than his wife, such woman being insane, he knowing her to be such, every person so offending shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be imprisoned in the penitentiary, and kept at hard labor not more than ten, nor less than three years."

Mr. Kowles, for the State.

502 Messrs. Nye & Jewett, for defendant, claimed that the said Louisa, being an idiot, had no will, and, therefore, that a rape could not be committed on her person against her will; it was further claimed that the word *insane*, in the sixth section of the act, did not embrace an idiot; and, hence, that the defendant could be convicted of neither of the charges embraced in the indictment.

Mr. Justice NASH. It is claimed, *first*, that a female idiot is not the subject of a rape; that she has no will, and, hence, an act cannot be done to her person against her will. No authorities are cited for this startling position. On looking into the books I can find no such distinction intimated; and, if such was the law, it is singular that so important a qualification of the crime of rape should not have been noticed hitherto in any treatise on this subject. Rape is defined to be, the having carnal knowledge of a female, *forcibly and against her will*. There is here no limit to the use of the word female; nothing said as to the

soundness or unsoundness of her mind, as to idiocy or insanity. In this respect our statute follows the common law; and must therefore, be construed as the same words were construed in the definition of the crime at common law.

There is another consideration not to be overlooked. The section providing for punishing assaults with a criminal intent, declares that an assault committed on another with the intent to commit a rape shall be criminal. Now, if a rape cannot be committed on the person of an idiot, then it is no crime to assault her person with such an intent. The same reason applies also to assaults committed on an insane person; since this argument places them without the protection of the law punishing the crime of rape. Nor are insane persons protected under the sixth section, since the crime there described is committed only when the perpetrator knows the woman to be insane. Indeed, that section is clearly limited to the case of a male person's knowingly having sexual knowledge of an insane female without resistance on her part, and with her acquiescence. Hence, this section cannot be made to embrace the case of one having such sexual intercourse forcibly and against the will or resistance of such insane female.

It is further claimed that an idiot is not an insane person under the meaning of that term in the sixth section. This result, then, follows, that a female idiot is left wholly unprotected against this class of crimes. A person cannot be punished for having carnal knowledge of her person forcibly and against her will, as she has no will to overcome; she is not an insane person, and so not under the protection of the sixth section, and neither an idiot, nor an insane female are protected against assaults made with the intent to commit a rape; since a rape cannot be committed on the person of either. 503

It must require some very cogent reasoning, or some very convincing authorities, before a court could be induced to give a construction to a statute, which must lead to such results. But here is no such authority; no such decision has been found. Is there any more force in this reasoning? Let us examine it for a moment.

In the first place, where the carnal knowledge is had by *force*, it must be against the will of the female. Nor need there be any direct evidence of this action of the will; the law implies the want of consent from the force itself. It is the *consent* of the female which takes away all criminality from the connection; it is this want of consent which renders this connection, obtained by force, criminal. Hence, if an idiot has no will to be overcome, she has none to consent; and then the law implied that the act, being accomplished by force, is done against her will.

But is it true that an idiot or insane person has no will? What is the definition of these two words? Do they imply the *loss* of *will* or a mere *unsoundness* of mind? These words are thus defined by Webster: "Idiot, a natural fool, a fool from his birth; a human being in form, but destitute of reason or the ordinary intellectual powers of man. Insane, unsound in mind or intellect; mad; deranged in mind;" and one of the words used to define *insanely* is *foolishly*. Fool is defined to be one who is destitute of reason, or the common powers of understanding; an idiot. Some persons are born *fools*, and are called *natural fools*; others may become *fools*, by some injury done to the brain. In Chitty's Med. Jurisp., 348, "an idiot is defined to be a person who has been *defective* in intellectual powers from the instant of his birth, or at least before his mind had received the impression of any idea." Again, Chitty says, that idiocy

consists in a defect or sterility of the intellectual powers ; but it may be induced in after life ; while lunacy or madness consists in a perversion of *intellect*." All these definitions imply either a *weakness* or *perversion* of the mind or its powers, not their *destruction*. The powers are still all present, but in an impaired and weakened state. Hence, an idiot cannot be said to have no *will*, but a *will weakened and impaired*, a will acting, but not acting in conformity to those rules, and motives, and views, which control the action of the will in persons of sound mind. Indeed, 504 in an insane person the will is too often fearfully active, and wholly uncontrollable by reason or persuasion. There is here no *lack* of will, but simply a *perversion* of it. Nor is this the most conclusive answer to this argument. If there is no will, how are the voluntary actions continued? Actions, which, like respiration, are instinctive, are independent of the will ; but eating, and numerous other acts, which necessarily imply the exercise of the will, are performed by idiots and insane persons ; and their exercise demonstrates the existence of a will ; of a will which can assent to, or dissent from, what are clearly voluntary acts. I have, therefore, no hesitation in holding that both idiots and insane persons are possessed of a will, so that it may be legally and metaphysically said, that a carnal knowledge may be had of their persons *forcibly* and against their will.

The next inquiry is, what is the proper construction to be given the word *insane*, in the sixth section of the act for the punishment of crimes? Curwen's Rev. Stat., 184. That section provides, "that if any male person, seventeen years old, and upward, shall have carnal knowledge of any woman, other than his wife, such woman being *insane*, he knowing her to be such, shall be deemed guilty," etc. It is claimed that this word *insane* does not embrace a female, who is an idiot. We have already seen that idiocy may be induced after infancy, as well as be congenital, Chitty's Medical Jurisprudence, 347 ; and that both terms are defined by the same words—*unsoundness of mind*. In the one case this unsoundness of mind develops its existence in a want of capacity to reason at all, or at least in a much less degree than the generality of mankind ; while in the other there is, perhaps, greater acuteness, though upon false and fancied hypotheses, Chitty's Medical Jurisprudence, 348. Still, in both cases, unsoundness of mind is the cause. The very origin of the word *insane* demonstrates this ; in its Latin origin, it is a word simply meaning *unsound*, and nothing more ; and in the popular language it is used in this sense to this day, whatever may be the specific meaning attached to it by writers on mental diseases. If, then, the object and policy of this statute embraces idiots as well as lunatics, there is nothing in the use of the word *insane*, which absolutely precludes us from giving that elementary meaning to the word in this statute. The reason of this provision clearly applies to idiots as well as to lunatics ; if there is any reason in the case of female lunatics, why sexual intercourse with them should be prohibited, equally strong is the reason why it should not be permitted with female idiots ; if the offspring in the one case might be affected with insanity, so in the other it might with idiocy. Whatever reason, therefore, can be found to call for the law in relation to 505 female lunatics, will apply in an equally cogent manner to idiots. If the one class ought to be protected, equally so ought the other.

Such, then, being the manifest scope of the law, I can have no hesitation in concluding that such was the intention of the legislature ; that this word *insane*, was used in its elementary and popular meaning, as

descriptive of that unsoundness of mind which renders individuals civilly and criminally irresponsible for their acts, whether that unsoundness discloses itself in idiocy or lunacy.

In accordance with these views I hold that a female idiot, or an insane female, is the subject of a rape; and, hence, of an assault with the intent to commit that crime; and that a male person, of the proper age, who shall have carnal knowledge of a female idiot, knowing her to be such, is guilty, under the sixth section, of having carnal knowledge of an insane woman, knowing her to be such.

The jury was so charged, and they returned a verdict of guilty of an assault with an intent to commit a rape, and not guilty on the other two counts; and sentence was passed on the prisoner.

PLEADING.

[In the Court of Common Pleas, Washington County, Ohio, May Term, 1853.]

Before Mr. Justice Nash.

WOOD v. WARD.

Rules of court—Pleading issuably—Plea of the statute of limitations—The legality and morality of such a plea considered.

This was an action of assumpsit, under the late system of pleading. The declaration was on a count for money had and received; and the defendant was in default for a plea. The 10th rule of the court is as follows:

10. Defendant in default for want of a plea, shall, if required by plaintiff show by affidavit, or otherwise, that he has a meritorious defense; he shall then plead *issuably*, and proceed to trial, or show cause for a continuance.

The defendant, had, under this rule, obtained leave to plead on terms; and, having filed the necessary affidavit of a meritorious defense, he filed two pleas: 1, non-assumpsit; 2, that the action did not accrue to the plaintiff within six years, etc.

Whereupon the plaintiff filed a motion to strike out the plea of the statute of limitations, because plead after a default. 508

Messrs. Clark & Ewart, for Plaintiff.

Messrs. Rhodes & Welch, for Defendant.

NASH, J. I will consider this motion first, as affected by the rule of this court; secondly, upon principle, independent of the rule; and thirdly, upon the authorities.

The rules of the court are the law of the court, and must be as inflexibly followed by the court as a statute of the state. The court is not permitted to disregard the rules or laws of its own making, any more than the common or statute law. Parties have as good a right to rely upon the inflexible execution of the one as the other.

What, then, is the meaning of this rule? The affidavit of merits has been made in the usual form; and the only question, therefore, remaining, is what is the meaning of the words, "*he shall plead issuably?*" What is then an *issuable* plea? It is not a dilatory plea—a plea which merely shows that this particular action cannot be sustained—hence, a

special demurrer, or a plea in abatement, or of alien enemy, is said not to be an issuable plea, coming within the rule to *plead issuably*. In 3 Chitty's General Practice, 705, an *issuable* plea is said to be any *substantial* matter of fact, or law, that will *perpetually bar* the action; and such a defense may be raised either by plea, or general demurrer. The pleading must bring the *legal merits* of the case, some question of fact, or some question of law arising on the facts in issue, or it does not comply with the condition of the rule.

The plea of the statute of limitations goes directly to the *legal merits* of the case, and, if true, show that the plaintiff has no right of action against the defendant; the plea sets up a perpetual, not a temporary, bar to the action, and hence comes directly within the definition of an issuable plea. Hence, in *Rucker v. Hanny*, 3 Durnford & East's R., 124, the court of king's bench decided that such a plea was an issuable plea within the rule, and might be pleaded after a default upon leave granted to plead on *usual terms*; by which it is meant pleading *issuably*, rejoining gratis, and taking short notice of trial; 3 Chitty's General Practice, 705. But there would not seem to be any room in Ohio to question this doctrine, since the decision of our supreme court in the case of *Hill v. Henry*, 17 Ohio R., 9. In that case it was held that, under our statute, a cause of action, once barred by the running of the statute of limitations, could not be revived by a new promise so as to enable
507 the party to maintain an action upon it. The action must be on the *new* promise, and not on the *original* one. Following the spirit of this decision, the district court, at its last term in Gallia, held that a cause of action, once barred, could not be revived by the promise of an administrator, so as in any way to charge the estate, *Drouilliard against Wilson*, 10 Western Law Journal, 385. This plea, then, under our decisions, shows that this cause of action is *extinct* in law as effectually as if paid or released, or extinguished by a certificate of bankruptcy. Is not this plea, then, an issuable one? Can any plea be found coming more clearly within the terms of *pleading issuably* than one which shows the cause of action extinguished; so thoroughly extinguished that it can not be revitalized, only by a new promise? I have no hesitation, therefore, in holding that this plea comes within a fair construction of this rule of this court, and so cannot be stricken out.

But it is claimed that such ought not to be the rule; that this plea is unconscionable, and not to be favored. Under our rule the party must, by affidavit, show a meritorious defense before he can be permitted to plead at all; and, having made this affidavit, is he not to be permitted to make this defense by any competent plea? Ought the court to control him in the manner of making this defense? The affidavit is provided as a protection against sham defenses; and is not this enough? I do not recognize any right in the court to dictate to a party the mode in which he shall set up a meritorious defense; whatever plan is adapted to that defense he has a right, in my opinion, to make use of.

But is this plea of the statute of limitations an unconscionable defense? one which the party must make at his peril, and at the first moment at which he is, by the rules of the court, required to plead? If this is the law, then a defense, which is founded upon a statute of the state, is to depend upon the activity of a party, or his counsel; and by any the least oversight on the part of either he is to be deprived of it, though guaranteed to him by a statute of the state. Are men's *legal* rights to depend upon any such *sharp practice* as allows one party to

make a defense which is prohibited to another? and that defense, too, predicated upon a fact which, under our law, shows the cause of action to be extinguished? Is a court administering the *law* or *its own code of morals* when it renders judgment against a defendant on a claim which, on its face, is dead, defunct, extinguished in law, when that defendant claims the right to set up this fact by way of defense? If it is right to do it in one case, why not in all? If a court can say that a party shall not be permitted to set up one defense because the court may think the defense immoral, unconscionable, why not apply it to all cases and thus make men's rights to depend upon the *ethics of the court* and not the *law of the land*? But here, again, would be a difficulty. The opinions of judges would be more variant, as to what defenses were moral or immoral, conscientious, or unconscientious, than as to what is law or not law—whereby infinite confusion would be introduced into the administration of justice. 508

What right, however, has a court, appointed to administer *justice* according to *law*, to declare the *law* unjust, iniquitous, unconscionable? The law is made by another body, to which is delegated this all-important power of declaring what shall be and what shall not be the *law* of the land; the law by which all rights shall be acquired, prosecuted or extinguished. Upon the courts devolves, solely, the function of administering, of distributing justice according to those laws. For a court, therefore, to assume to declare the policy of a statute immoral, or a defense authorized by a statute unconscionable, is to libel the general assembly enacting the law; is to charge it with enacting laws authorizing parties to interpose unjust, iniquitous, dishonest, unconscionable defenses. For surely if the defense is unconscientious after a default, it must be equally so before; and hence is unjust, dishonest, unconscionable in all cases. If all this is true, it may be a very good ground for *repealing* the law; but I have yet to learn that expediency is any ground for a court's refusing to execute a law.

But is such the character of this statute? It has now been the law in England and America for nearly two hundred years; and is it possible that it could have stood so long against an enlightened public opinion, if the act did thus palpably legalize injustice, iniquity, and immorality? I can bring my mind to no such conclusion; the law must contain in itself the elements of a right policy, or it never would have endured for this length of time. And since the case of *Bell against Morrison*, 1 Peters' U. S. R., 351, I had supposed that the policy of this law had been clearly understood and recognized. That case vindicates that policy—a *policy of repose*—upon the high ground that the interest of the state requires that, after a reasonable lapse of time, rights of action should become *extinct*, litigation should be precluded. "We are satisfied," says Chief Justice RICHARDSON, in *Exeter Bank against Sullivan*, 6 New Hampshire, 124, 133, "that the statute of limitations was intended to be a statute of repose. It is a wise and a beneficial law, having a tendency to produce adjustments of affairs between parties, while they remain fresh in their recollections, and before time, in its lapse, has thrown darkness and obscurity upon them. It is neither unjust, nor discreditable, to take advantage of the statute, especially in the case of a surety." See *Blair against Drew*, 6 New Hampshire, 235. The doctrine so ably expounded and vindicated in *Bell against Morrison*, 1 Peters' R., 351, has been repeatedly recognized and acted upon by the courts of the United States, and the states, in- 509

fluencing their decisions upon the various clauses of the statute, especially in overruling that class of decisions, which had nearly repealed the statute by construing almost any language into a waiver of its protection. In England they have by statute got rid of these absurd decisions, by requiring all promises, which are to avoid the running of the statute law, to be in writing. The same view of the statute as one of repose is strongly stated by Mr. Angell, in the first edition of his work on Limitations, page 26.

Are, then, courts to be *astute*, nay *sharp*, to defeat the operation of a statute, thus founded upon the great principle of public policy? The law declares *Interest Reipublicae est sit finis litium*; shall the courts reverse this ancient maxim? I think not. It cannot be done without a violation of the plainest principles; without erecting a court into an expounder of *ethics*, instead of *law*.

But how stands the case upon authority? The case of Rucker *against* Hanny, 3 Durnford & East, 124, is a solemn decision against this doctrine, and this case is recognized as law, in 3 Chitty's General Practice, 705; 6 Comyn's Dig., 138. The same doctrine is sustained in Ham *against* Goodwin, 1 Brevard R., 461; 6 N. H., 124, 235. There are other cases which seem to countenance a contrary doctrine, Reed *against* Clark, 3 M'Lean R., 480; Nelson *against* Bond, 1 Gill's R., 218; The State *against* Jennings, 5 English's R. 428. These latter cases go upon the ground that the defense is neither honest, nor meritorious, and hence are predicated upon the *ethics*, and not the *law* of the court making the decision.

It is, however, claimed that this question has been decided by our supreme court, and is, therefore, in Ohio, *res adjudicata*. I will now proceed to examine the two cases decided in Ohio, and ascertain, if I can, what really was there *decided*. The first case is that of Sheets *against* Baldwin, 12 Ohio R., 120. What then was the point really decided in this case? It was simply this: That as our statute (Swan's St., 684) having required that an appeal should be tried upon the pleadings made up in the court of common pleas, unless for good cause shown, etc., the court should permit the parties to alter their pleadings, the court
 510 would not then permit the pleadings to be amended by adding a plea of the statute of limitations. In this decision the court were right; the party had deliberately made up his issue, had once tried his case upon it, and could not now be permitted to change that issue, in order to change, thereby, the result of the case, and throw the costs already made upon the adverse party. This would be a fraud upon him. That, too, was the case of an amendment, and not a case of pleading after a default. And all the cases cited by the counsel for the plaintiff are cases where *amendments* to pleadings were not permitted for the purpose of adding the statute of limitations. It is the *dictum* of WOOD, J., which is cited on this point, in which he says, that the authorities, English and American, concur in the doctrine, that this defense is not permitted after a default. The authorities already cited show this dictum to be untrue. The next case is that of Newsom's Administrator *against* Ran, 18 Ohio R., 240. In that case, leave was, in the common pleas, refused to the plaintiff to plead the statute of limitations of either four or six years after a default, though that default had happened from the attorney's misunderstanding the practice of the court. The four year limitation is introduced into our law from the statute of Massachusetts; and there it had been decided

that this was a bar the administrator could not waive; that he was bound to make the defense; and, neglecting to do it, he himself must pay the debt, and could not charge it over on the estate, *Brown against Anderson*, 13 Massachusetts R., 201; *Dawes against Shed*, 15 Massachusetts R., 6; *Ex parte Allen*, 15 Massachusetts R., 58; *Thompson against Brown*, 16 Massachusetts R., 172; *Heath against Watts*, 5 Pickering R., 140. Here, then, an administrator was permitted to be made personally liable for a debt barred by the statute, because his counsel had misconceived the practice of the court. Is it possible that such a case is law? But no matter what the court below did, what did the supreme court decide? Here is their own language: "This whole matter rests in the sound discretion of the court in which the pleas are to be entered, and we have no fear that this discretion will be abused. We are satisfied, that it has not been in the present case." This whole matter, then, is a matter of discretion; and if a matter of discretion, then the exercise of this discretion cannot be controlled, or re-examined in a superior court. Error will not lie upon what is a matter of discretion in a court, 2 U. S. Digest, 160, §§ 8, 9; *Wall against Wall*, 2 Harris and Gill, 79; *Romaine against Norris*, 3 Halstead, 80; *Chase against Davis*, 7 Vermont R., 476; *Edghill against Bennett*, 7 Vermont, R., 534; *Magill against Lyman*, 6 Connecticut R., 59; *French against Stanley*, 21 Maine R., 512. The supreme court of Ohio, in this last case, then simply decide that, whether the plea shall be permitted to be pleaded after a default, is a matter purely of discretion with the judge or court to which the application is made. And the court admit that extraordinary circumstances will often demand a relaxation of the rule. The result, then, of our decision is, that it is discretionary with the court to grant, or not to grant, the permission, just as the judge or court may for the time adjudge conscionable or unconscionable. 511

How is this discretion to be exercised? There are only two ways in which it can be exercised: 1, arbitrarily; or, 2, on a preliminary trial of the case, to enable the court to adjudge whether in conscience the defendant can make the defense. The latter course is impossible in practice, as it involves a full and complete trial of the case on its merits, before a court can understandingly decide whether the defendant can with safety to his soul and conscience, be permitted to make a *legal* defense to a *legal* claim. The first method is not to be tolerated in a land of law. Men's rights are not to depend on judicial caprice, or mere arbitrary will. Whether a party is entitled to a certain defense is to be settled by law, and not by the arbitrary will of the judge. This is a discretion which can lead only to fraud and abuse, and is one which no judge should voluntarily assume. Wherever the law gives a *legal right*, let that right be preserved; let no judge step in between the party and the exercise of it.

I must, then, have some settled rule to guide my action, so that I may not be misled to allow to one party what I deny to another. I must, therefore, adopt some settled rule, which will apply equally to all; I must refuse or permit the leave on all occasions. The supreme court admit there are occasions, when justice requires this permission to be granted; and hence I have no alternative but to grant on all occasions. The statute has made lapse of time a defense; and, in my opinion, where I am permitting parties to make up their pleadings so as to enable them to avail themselves of their *legal* rights, I am in the path of duty, admin.

istering the law as the law is found, and not according to any scale of ethics which I may have adopted. The motion to strike out is, therefore, overruled; and the doctrine established, so far as I am concerned, that this plea will be treated as any other plea, which sets up a *legal bar* to an action.

541

CRIMINAL LAW.

[Court of Common Pleas of Gallia County, Ohio.]

Before Mr. Justice Nash, at Chambers, August, 1853.

EX PARTE CHRISTMAS.

[Reported by Mr. Justice NASH.]

Habeas corpus—Jurisdiction of probate court on peace warrants—Discharge of prisoner not indicted at the first term—Rules of construction of statutes.

In construing statutes, the general intent of the legislature, apparent from the object and scope of the act, should prevail, unless the wording of the act absolutely precludes such a construction.

The words crimes, offenses and misdemeanors, import something done, for which punishment is inflicted; while proceedings on a peace warrant are a remedy to prevent the commission of a crime, offense or misdemeanor.

In an accurate use of terms, proceedings on a peace warrant, though a criminal proceeding, is neither a crime, offense nor misdemeanor.

The act giving certain criminal jurisdiction to the probate court, construed to include a peace warrant under the terms, crimes, offenses and misdemeanors, such being the apparent intention of the legislature, and the object and scope of the act.

A mittimus, issued by a justice to the jailer, to receive a person into his keeping, in default of giving bail to answer a criminal charge, has no force to justify the jailer in detaining the prisoner after the expiration of the term of the court to which he was to answer for such charge. If he is longer to be detained it must be in virtue of some order of the court, made in his case.

If the court adjourns without any charge being filed against him, and without any action of the court in reference to him or his case, he is entitled to his discharge from imprisonment on a *habeas corpus*.

542 This was a case of *habeas corpus*, issued on the application of Rees Christmas. In his application, he set forth that he was imprisoned in the jail of the county, under the following state of facts. A complaint had been made against him of having made threats of personal violence against the party complaining; a warrant was issued, the case heard, and he required to give bail, in the sum of two hundred dollars, for his appearance before the court of common pleas of Gallia county, on the first day of the next term, and in default thereof he was committed to jail. The mittimus showed the cause of his commitment, but did not state in what term he was required to give bail, nor before what court he was required to appear. The case was heard before the justice on July 29, 1853, and he was committed to the custody of the jailer on the next day. The probate court met and adjourned on the first day of August, and no complaint was filed in that court against Christmas, nor was any order or proceedings had against him in the probate court. The transcript was in fact returned to the clerk of the court of common pleas, but not to the probate court. The jailer returned that he held the petitioner by virtue of the original mittimus issued by the justice, and made the same a part of his return.

Mr. Justice NASH. This application presents a very important question arising under the act defining the jurisdiction, and regulating the practice of probate courts, passed March 14, 1853, 51 Ohio Laws, 167. The twenty-ninth section of this act gives certain criminal jurisdiction to that court. The section proceeds, first, negatively, by declaring of what cases the probate court shall not have jurisdiction; and, second, affirmatively, by declaring that said court shall have exclusive cognizance of all other crimes, offenses, or misdemeanors, unless otherwise provided by law. The probate court is not to have jurisdiction of any crime, offense or misdemeanor, the punishment whereof is capital, or by imprisonment in the penitentiary, nor for any offense or misdemeanor, the original and exclusive jurisdiction of which is vested in justices of the peace, or in any mayor or magistrate of any town or city, nor of the crimes or offenses mentioned in certain acts, but which acts have no relation to the present question.

Before proceeding to an examination of the section, I will remark, that the words, unless otherwise provided by law, can have no effect upon the proper meaning and construction of this section, or of this whole chapter of the act. These words must be prospective in this meaning, and cannot have reference to laws in force at the time of its passage; because such a construction would render the whole chapter nugatory, since the laws then in force provided for the trial of all these crimes, offenses, and misdemeanors, before other and different tribunals. The fact, 543 then, that the present law otherwise provides for the trial of these cases can have no effect without nullifying the whole act, so far as it undertakes to transfer the jurisdiction of certain crimes, offenses and misdemeanors from the court of common pleas to the probate court. This section, then operates to transfer a present jurisdiction of the cases coming within its words, to the probate court, and so far necessarily repeals all laws in force at the time of its taking effect, which gave this jurisdiction to different courts. Whatever, then, the jurisdiction is, which is given to the probate courts, it is given absolutely, and is to remain with it, unless otherwise hereafter provided by law.

The way is now cleared for an examination of the question presented in this case; are proceedings on a peace warrant within the first section of this act? Is such a proceeding the prosecution of a crime, an offense, or a misdemeanor? The language of this section, both in its negative and affirmative portions, speaks only of crimes, offenses, and misdemeanors; of all crimes, offenses, and misdemeanors, the punishment whereof is capital, or by confinement in the penitentiary, the probate court shall not have jurisdiction; but of all other crimes, offenses, and misdemeanors, the probate court shall have exclusive jurisdiction. What, then, is the meaning of these terms? Do they embrace the proceedings under consideration?

Blackstone defines crime or misdemeanor, as an act committed, or omitted, in violation of a public law, either forbidding or commanding it. The only difference, he says, between the two words is, that the former is applied to offenses of a graver character, and the latter to those of a minor and less atrocious dye. To these crimes and misdemeanors, a punishment is necessarily attached, as consequent upon their commission. Blackstone uses the word offense as a more general term, inclusive of both the others. Chitty, in his work on Practice (1 Chitty's General Practice, 14), says that crimes and misdemeanors are punishable by indictment, or by particular prescribed proceedings, while offense may be

considered as having the same meaning, but is usually, by itself, understood to be a crime not indictable, but punishable summarily, or by the forfeiture of a penalty.

All these definitions seem to imply the commission of some act, which is forbidden by law, and the commission of which by an individual is punished in some way pointed out by law, either after a trial on an indictment, or in a summary way without the intervention of a jury, 544 by a judge, or justice of the peace; but still the punishment is inflicted for having done an act prohibited by law.

A peace warrant is, however, a proceeding to prevent the commission of a crime or misdemeanor; no punishment is awarded for having committed a crime, but sureties are required to prevent the doing of an act prohibited by law. Is there, then, any commission of a crime, etc., in a mere threat to commit one? Or, in other words, is the mere intention to commit a crime, or misdemeanor, or offense, declared by law to be, of itself, a crime, or an offense, or misdemeanor? It would seem, according to our ordinary views of crimes, etc., that the mere intent to do an unlawful act is nowhere forbidden and punished as a crime, or misdemeanor, or offense. And the thirty-fourth section of this act itself declares that in prosecutions for crimes, offenses and misdemeanors, cognizance of which is by this act conferred upon probate courts, no indictment by grand jury shall be required, but that the prosecuting attorney shall file an information against the parties, setting forth the charge alleged. This language seems to regard all this jurisdiction as being limited to cases in which an indictment heretofore had been required, and, if so, the act would not embrace the case of a peace warrant, in the proceedings on which no indictment has ever been required. The whole letter of the act, its whole details, clearly apply to cases where punishment is to be awarded for crimes, or offenses, or misdemeanors, actually committed, and to a proceeding which has only prevention against their commission in view. The letter of the act does not appear to embrace this proceeding, and, if I am to be controlled by the mere wording of the act, I should have no hesitation in holding that this proceeding does not come within it.

But while such is the letter of the act, its entire policy and general scope would embrace it. The object of the act is well known to have been, while it left the prosecution of the higher crimes in the common pleas, to transfer the trial of those of a minor character to the probate court, and such is the general intent apparent on the face of the act itself. The negative portion of it clearly implies that crimes, the punishment whereof is capital, or by confinement in the penitentiary, are the only ones remaining within the jurisdiction of the common pleas, while all other criminal matters are transferred to the jurisdiction of the probate court. And it is hardly supposable to believe, that while petit larceny and other minor and infamous offenses are transferred to the probate 546 court, that this still less important matter should be left to the jurisdiction of the court of common pleas. Such a supposition is contrary to the whole object and scope of the act. It is clear that the draftsman of the act supposed he had embraced within the terms of the twenty-ninth section, the entire criminal jurisdiction of the state. After an exception of certain crimes, etc., all others are handed over to the exclusive jurisdiction of the probate court, and the difficulty is created by the want of a clear comprehension on the part of the draftsman of what this criminal jurisdiction consisted; he seems to have supposed that it was composed of crimes, offenses and misdemeanors, while here is a criminal pro-

ceeding that can hardly be said to come under either of these terms. The whole difficulty would have been avoided by the change of a word—of misdemeanors for criminal proceedings. If the language of the act had been, the exclusive cognizance of all other crimes, offenses and criminal proceedings, there would have been no ground for uncertainty; as it is worded there is great doubt.

The general scope, and object, and spirit of the act seem, therefore, to be in conflict with its letter and its details. The reason of the act would embrace this proceeding, while the language seems too limited and narrow to include it. Which, then, is to prevail? Shall the scope and object of the act be defeated by the unskillfulness with which it is drafted, with which it is worded? Or shall the wording and letter of the act be made to yield to its more liberal and comprehensive spirit and object? Shall the general, or the special intent, prevail?

There are certain rules which have been adopted to aid in the construction of statutes. One is, that penal statutes must be construed strictly. *Hall v. State*, 20 Ohio R., 7. But this is not a penal, but a remedial statute. Its object is not to define a crime, but to provide a court, where the crime, etc., shall be prosecuted. It is purely a remedy that is here provided for; and hence there need be no more strictness in construing this statute than in construing any other statute. Indeed, a remedial statute is to be construed liberally, in order to effectuate its intent, and to meet the beneficial end in view. Broome's Legal Maxims, 39, 93, 246.

The first and all-important rule to be regarded in construing a statute is, to have respect to its spirit, rather than its letter. *Spicer v. Giselman*, 15 Ohio R., 338, 341. The natural force of words, when taken by themselves, is not always the true test in construing a statute. *The State v. White*, 17 Ohio R., 32, 34. It has been decided that a thing within the letter was not within the statute, unless within its intention. The letter is sometimes restrained, sometimes enlarged, and sometimes the construction is contrary to the letter. *Burget v. Burget*, 1 Ohio R., 469, 480. These rules of construction have all been recognized by our supreme court as sound. And hence I am not only permitted, but required to apply them to the interpretation of this act. Guided by these rules, the mere letter of the act must yield to its manifest intent and object. It is to be so construed as to effectuate and carry out this intent and object, unless the language cannot be forced into such a meaning. *Vide also Jackson v. Collins*, 3 Cowen R., 89; *Wilkinson v. Leland*, 2 Peters' S. C. R., 662; *Gibson v. Jenney*, 15 Mass. R., 205; 12 Mass., 383. 546

In the loose way in which language is used by unskillful draftsmen of laws, it cannot be said to be doing great violence to these words to include under the words offense or misdemeanor, this proceeding on a peace warrant. The law does not, indeed, declare the threat a crime or misdemeanor, yet it treats the party as somewhat criminal; but resorts to a preventive, instead of a penal remedy. In popular language, the conduct, which is followed by such consequences, may be considered as criminal and an offense. It may be followed by consequences more severe than usually attend on the commission of petit larceny, and assault and battery, or the selling of intoxicating liquors. The party is required to give bail for his good behavior, or he must stand committed to jail for an indefinite length of time. It is clearly a criminal proceeding. It is so treated in the act defining the powers and duties of justices of the peace and constables in criminal cases. Curwen's Revised Statutes, 340. And

in the case of *Adams v. Ashby*, 2 Bibb. R., 96, it was expressly decided that a proceeding of this kind came within the words, criminal cases, found in an act of the legislature. This proceeding is also treated of by Blackstone under the same general head as crimes and misdemeanors, and is called a proceeding to prevent the commission of a crime, etc. 4 Blackstone's Commentaries, 251. The same view is taken of it in 1 Chitty's General Practice, 30, 674. Chitty considers this, and punishments for offences committed, as remedies; and hence as being each a kind of punishment. I do not think, therefore, that I overstep the ordinary rules of interpretation in holding, that this criminal proceeding, coming as it does within the spirit of the act, can be brought with its letter without doing unnatural violence to it. After some hesitation, therefore, I have come to the conclusion that the jurisdiction of proceedings on a peace warrant belong not to the court of common pleas, but to the probate court. Still, 647 owing to the careless wording of the act, I make the decision not without some hesitation. It is only by giving to the general intent of the act a controlling influence over its letter that such a decision is justified.

Whether the law regulating this proceeding in the court above is altered so as to require the filing of an information, and to entitle the party to a trial by jury, I am not now called upon to decide. The act regulating this proceeding required the complainant to be heard by the court; but the thirty-fourth section of this act of March 14, 1853, seems to carry upon its face the idea, that in whatever way jurisdiction is conveyed, it is to be carried out by the filing of an information, and the proceedings consequent thereupon. Whether the letter is here again to be controlled by the spirit and general object of the act will be for the probate court to decide in the first instance. No constitutional guaranty requires a jury trial in such a case; hence a liberal construction may be resorted to, when it is in accordance with the object and spirit of the law. Still there will be found more difficulty in avoiding the words of the act on this point than on the other. Such unskillfulness in drafting laws is wholly inexcusable, whether originating in carelessness or ignorance.

The only other question remaining grows out of the form of the mittimus itself. This is defective in two particulars—it does not state in what sum he was required to enter a recognizance, nor at what court he was to appear. Both of these facts are required to be stated by the form of a mittimus given in the act. Curwen's Statutes, 349. But this defect may be cured by the act of February 28, 1834. Curwen's Statutes, 128. This act provides that no person shall be discharged by reason of any informality or defect in the mittimus, provided it shows a criminal matter, of which the justice had jurisdiction. Hence, on the face of the warrant, it may be insisted that he was committed to answer in the proper court. But, if we look into the transcript of the proceedings before the justice, it appears from that, that he was required to give bail for his appearance before the court of common pleas at its next term. If the court had no jurisdiction of the case, any recognizance taken for his appearance there would have been void. *The State v. Johnson*, 13 Ohio R., 176; *Treasurer v. Merrill*, 14 Vermont R. 64; *The State v. Sullivant*, 3 Yerger R., 281. And it would seem a necessary conclusion that a commitment, based upon a default for not giving illegal bail, would be equally void.

But it is said that the court cannot go behind the commitment. I am not satisfied that this position is correct. In England, the court, on

a *habeas corpus*, examined the depositions taken there, on the examination before the justice, to ascertain whether they show that the accused has committed any crime; and, if it appears from them that he has not committed a crime or offense, he is discharged. 1 Chitty's General Practice, 692. Here is authority sufficient to justify a court in looking into the transcript where the mittimus is defective, if not in all cases. 548

But admitting this cannot be done, still the case stands in a no better condition. He was committed in July, and the probate court has since met and adjourned, without any proceedings having been filed in that court against this applicant, when the statute requires them to be filed at the first term after the commitment. Hence, this party is entitled to be discharged for a want of prosecution. The mittimus has exhausted its force; it extended no authority to detain, only until the court should meet and act; if retained in custody after the court has met and adjourned, it must be by virtue of some order of that court, made on some proceeding pending therein against him. This question was in principle decided in *Ex parte Watkins*, 7 Peters' S. C. R., 568, 670.

The law of Maryland provided that where a party was taken into custody on an execution issued for the collection of a fine assessed in a criminal proceeding he was entitled to be released at the return term of the court, unless he was then prayed into custody, and an order of the court made to that effect. Watkins had been arrested on an execution, but at the return term of the court no motion or order for his commitment had been made, and the marshal still held him in custody on the original execution; but the court held that the execution was inoperative after the time for its return had passed, and that the marshal could not after that time justify his detention under the execution. The only authority to detain after that was an order of the court, made on the prayer of the proper officer, that he be taken into custody. No such order ever having been made the supreme court of the United States, on the *habeas corpus*, ordered Watkins to be discharged. So in this case the commitment was until discharged by due course of law. By due course of law he was bound to answer a complaint to be filed in the probate court at its next term. This term has come and gone, and no complaint has been made in this court against him. What right, then, has the jailer to detain him? The mittimus gives him no authority, because its power ran out with the adjournment of the court. He has no authority derived from the probate court, that court never having had any complaint filed in it against him, and hence never having made any order for his detention. A failure to file the transcript was an abatement of the proceedings; such an abatement that these proceedings cannot be revived nor any further prosecuted. This man is, therefore, kept in jail by virtue of a proceeding which is as much at an end as if he had been tried and found not guilty, and discharged. The discharge would follow the finding, unless the court saw cause to require of him a new recognizance, or committed to answer some charge alleged against him. But no such order could in this case be made, because the probate court had no case before it. 549

On all these grounds, then, I hold that this party is entitled to be discharged, and it is ordered accordingly.

INDEX.

- Abatement of Action—**
Marriage of single woman after commencement of, 58.
- Abbreviation, not error, though not commendable, 56.**
- Accounts—**
Mutual accounts—limitation of actions as to application of payments, 555.
- Administration of Estates—**
Executors purchasing at their own sale, and reselling at an advance—Rights of legatees, 456.
Lapse of eighteen years after settlement of executor's accounts is a strong circumstance against the relief sought, 456.
Appointment of a debtor as executor, does not extinguish a debt due the estate from the executor, 352.
Foreign administrator has authority to collect debts here, 55.
- Affidavit to Bail—**
Matters which will be heard upon, 139.
Things which may be stated upon belief, 132.
Facts to be set forth in, 433.
- Agency—**
Liability for negligence when acting without compensation, 119.
- Alimony *pendente lite*, 393.**
- Amercement—**
Service of two executions from different counties, 12.
Liability of sheriff to, 41.
When sheriff is not liable to, 218.
- Appeals—**
Administrator is not required to give bond, but must use due diligence in perfecting his appeal, 482.
Refund required of money deposited to abide decree, but distributed before final judgment, 56.
When lie to district court, 450, 451.
Judgments obtained before passage of act authorizing, 450.
Dismissed for failure to fix the amount of bond, 445.
Conditions precedent -- Subsequent bond will not cure defects, 445, 447.
Appealing part of a case, 448.
- Giving bond after repeal of law authorizing appeal, 136.
- Appeal erroneously dismissed on mistake of fact, reinstated on motion, 585.
- Apprentice—**
Failure to record indenture, 22.
- Appropriation of Real Estate—**
Railroad decisions, 326.
Construction of provisions for in a railroad charter, 316, 343.
Exemption of cemetery lands from, 316, 343.
Damages for property taken—Benefits to be deducted. Differences between general and special benefits, 269.
Taking private property for railroads, mode of compensation, 474.
Judgment of condemnation will be arrested if judge is a stockholder in the railroad corporation for whose use property is appropriated, 501.
Right of examination and survey is incident to right of appropriation by a railroad company and necessary to its proper exercise, 553.
Taking possession of land for purpose of constructing a railroad without payment or tender of damages assessed, or giving security, makes the company liable for trespass, 553.
- Arbitration, 168.**
Agreement by one partner to refer, 58.
- Arrest for Debt—**
Action on bail bond cannot be maintained without giving the bail the statutory notice, 277.
Arrest of a citizen of another state is a violation of the constitution of the United States, 307.
Not allowed on ground of non-residence, 433.
Defective affidavit, 169.
Affidavit not sufficient to justify issuing *capias*, 483.
- Assault and Battery—**
License to commit, 47.
- Assignments—**
Assignee not taking possession, 59.
- Assumpsit, may be maintained to recover consideration, money due on a deed, 268.**

Attachment—

Writ of attachment is applicable to breach of promise to marry, 312.

Service of writ if without indorsement—Second seizure where first writ was defective. Issued after adjournment of court, 385.

Priority of over assignment of claim, 58.

Motion to quash writ of, 169.

Of separate property of one of three defendants, 245.

Extent of obligation of garnishee to pay attaching creditors, 245.

Foreign corporations, 80.

Attorneys—

Fees for defending indigent prisoners, 135.

Allowance of fees for aiding in prosecuting a state case—Remedy when allowance is made by mistake, 506.

Client may dismiss at any time, 54.

Bail—

Admission of convict to on allowance of writ of error by supreme court, 155.

Banks and Banking—

Payment of deposits in specie, 29.

Liability of bankers, 59.

Construction of banking law as to loans to directors, 347.

Loan and deposit distinguished, 520.

Agreement to take depreciated notes for goods, 195.

Bankruptcy, 57.**Bastardy, 57.**

Settlement in manner different than that pointed out in statute, 168.

Bigamy, 171.**Bills and Notes—**

Title to sealed bill passes only by endorsement, 46.

When note is payable in specific articles, consideration must be set out and proven, 382.

Place of a demand of a note, 376, 378.

Sufficiency of notice of protest, 378.

Presentation for payment—Sufficiency of notice of dishonor, 202.

Action on lost note, 58.

Note payable "when Polk is elected" is valid, 177.

Sealed bills are not negotiable except by indorsement, 573.

Legal order of indorsements cannot be controlled by accidental position of names of indorsers, 516.

Joint makers—demand upon is sufficient to charge indorser, 516.

Plaintiff cannot be compelled to fill up blank indorsement, 517.

Bills of Exceptions—

Reason must be given for refusal of judges to sign, 51.

Sealing necessary, 381.

After signed not in power of court to amend, alter or withhold from record, though its statements are erroneous, 551.

Judicial notice will be taken of terms of court, 509.

Bills of Lading—

Assignee of cannot maintain action upon his own name, 477.

Defendant may prove that the property described was never shipped, *Id.*

Master is competent witness to prove non-shipment, *Id.*

Bonds—

Right of county commissioners to sue upon bond of clerk of common pleas, 99.

Where a bond executed in one state is to be paid in another, the law of the latter state governs the validity, 472.

Bank in New York held not to have authority to take a bond secured by mortgage on real estate out of that state, 472.

A bond and mortgage executed in Ohio, and delivered to a fraudulent banking company in another state, to obtain and put its worthless paper in circulation in Ohio, are void, *Id.*

Assignee of the bond takes the same subject to all equities, *Id.*

Boundary line between Ohio and Michigan, 280.

By-Laws, what are reasonable and valid, 179.

Canals—

Liability of boat owner for penalty incurred by captain or hands—Collection of tolls, 251.

Commissioners cannot loan canal funds. Distinction between a deposit and a loan—Construction of embezzlement law, 520.

Capias—

Affidavit for *ca sa*, 135.

Affidavit of a party without other testimony, not sufficient to authorize issue of a *ca sa*, 132.

Clerk of Courts—

Proceedings for removal of for breach of good behavior under the election law, 284.

Champerty, contract void for, 439.

Chancery practice, foreclosure, 56, 57, 58.

Chattel Mortgage, notice of is equivalent to filing, 392.

Children, custody of, 370.

Common Carrier—

Liability of for package, 54.

Common carriers are not liable for money in trunks of travelers, lost by the carrier's servants, nor when gratuity is paid the servant to care for the trunk, 491.

Conflict of laws, 393.

Constables, rights and duties of in keeping order, 353.

Contempt of Court—

Writ of attachment for must be in name of the "State of Ohio," 278.

Attachment for contempt, 22.

Continuance, 58.

Contract—

When consideration must be set out and proven, 382.

Payable in specific articles is not a note, 382.

Assigning right to sue for infringement of patent right held champertous, 439.

Dissolution of—Impairment of obligation of, 360.

No contract is binding which is expressly forbidden by law—Security on such a contract is void, 520.

Where a contract is for a year at so much a month, laborer is entitled to wages every month, 575.

Conveyance—

Consideration of deeds—Undue influence—Mental incapacity, 510.

Corporations—

Voting subscription by township to a plank road company, 312.

When majority of directors cannot bind the parties, 150.

There can be no conditional or partial acceptance of a charter, or of an amendment thereto—Amendments may be accepted by majority of corporators, 532.

Is bound by act of its agents, same as individuals are, 532.

To justify court of equity in interposing to prevent a corporation from exceeding its powers, either a gross abuse of discretion or the exercise of a power not conferred must be shown, 532.

At suit of a corporation, injunction to restrain directors from exercising

discretionary powers will not be granted, when interests of third persons will be greatly prejudiced, where corporator has admitted existence of such powers, 532.

Corporations acting under charters of other corporations—Cannot effect ends the latter cannot lawfully consummate, 559.

May be shown that pretended corporation was not instituted to carry out legitimate purpose of the law, 559.

Costs, motion for security for filed too late, 457.

Counterfeiting, bills of less than five dollars, 52.

Evidence of statements made by accused—Identification of bank note passed, 426.

Covenant—

Action of may be maintained upon condition of a penal bond—Words of recital may be foundation of, 494.

Creditor's Bill—

Judgment creditor who goes into chancery to collect his judgment from persons indebted to his debtor has no greater rights than judgment debtor, and if plea of infancy is a bar against a claim in action by the judgment debtor, it will be a bar against the creditor, 503.

Judgment creditor may recover from infant damages for conversion and sale of property held by him under bailment, 16.

Criminal Offenses—

Assault with intent to kill, 17.

Stabbing with intent to wound, 17.

Criminal Law—

Insanity as an excuse for crime, 416.

Mental imbecility as excuse for crime, 417.

Confession to be received with caution unless corroborated, 417.

Reasonable doubt defined, 417.

Prisoner standing mute, 64.

Plea of guilty cannot be withdrawn to move to quash indictment for irregularity. Remedy is to move to arrest judgment, 527.

"Caption" and "surplusage" with reference to an indictment defined, 527.

District court has no criminal jurisdiction, 550.

Rape, or assault to commit rape, may be committed upon an insane female, or female idiot, 586.

- The word *insane* in the statutes embraces the case of having carnal knowledge of a female idiot knowing her to be such, 586.
- Proceedings on a peace warrant, is neither a crime, offense nor misdemeanor, 594.
- Probate court has jurisdiction on peace warrants, 594.
- Jailer is not justified in detaining a prisoner after the term of court at which he was to answer the charge without some order of the court, 594.
- Damages, for assault and battery, 47.
- Decree—**
- To set aside defendant's, must furnish reasonable excuse for their delay—
Negligence of defendant's agent not imputed to him, 181.
- Deed—**
- Omission of grantor's name from premises, 84.
- Covenants in defective deed, 58.
- Consideration of explained by parol, 58.
- Joint execution by husband and wife not required, 183.
- Demurrer—**
- Will lie where case made in bill appears to be barred, 414.
- Depositions—**
- Certified copy of another paper as a part of, 84.
- May be taken any time after service, 376.
- Proof of service of notice to take, 56.
- Divorce—**
- Personal service necessary, 135.
- Dower—**
- Reversioner who voluntarily pays taxes for a number of years, cannot afterwards, without notice, evict the tenant for life, because the lands are sold for taxes, 276.
- Election of widow must be made within six months, but the statute is not imperative as to the period at which the election shall be recorded, 260.
- Act embracing then existing suits can operate prospectively only, 55.
- Certificate of acknowledgment as a bar to, 405.
- Petitioner for, must prove her marriage, 368.
- Dower, 127.
- Lands alienated in lifetime of husband, not assigned in improvements, 221.
- Claim for embraced in covenant of warranty, 247.
- Assignment of by share of rents and profits equivalent to eviction, 247.
- Ejectment, 75.**
- Tenants made, defendants instead of casual ejectors, 167.
- Elections—**
- Judges of and qualifications, 350.
- Voting for justice out of one's township, 36.
- Eminent Domain—**
- No power in the state to grant it to any corporation, so that it cannot be resumed, 316, 342.
- Equity—**
- Demurrer lies when party has an adequate remedy at law, 150.
- Error—**
- Effect of changing constitution, 451. .
- Mistake of date, 454.
- Jurisdiction of district courts to issue writs of, 492.
- Order of reservation does not of itself transfer a case to the supreme court, 559.
- Estoppel—**
- Complainant suing a company by its corporate name is estopped from denying corporate existence, 559.
- Evidence—**
- Recital of consideration is open to parol explanation, as between the parties, 267.
- Waiving evidence of incompetency of a witness, 15.
- Proof of a misnomer under plea in abatement, 18.
- Admissions by wife, no acts as interpreter, to bind husband, 47.
- Proof of property in burglary, 55.
- Confessions of prisoner on inducement that it would be better for him, 55.
- Secretary of a company not competent to prove its liability, 8.
- Subsequent lessee not disqualified, 15.
- Circumstantial, 428 ; Weight of, 416.
- Testimony of witness after his conviction and before sentence not competent, 436.
- Stockholder a competent witness for the corporation, 440.
- Testimony, in a criminal case, of a deceased witness, 416.
- Testimony of a deceased witness, 381.
- Statements made by the accused, 426.
- Witness called to give evidence in one branch of a case becomes a witness for the whole case, 404.

Evidence—Concluded.

- Matters of law given in evidence under the general issue, 198.
- Justices transcript as evidence of false return of a constable, 58.
- Record of divorce case as evidence of facts found, in a subsequent suit, 135.
- Parol evidence to show indorsee agreed not to have recourse against indorser, 79.
- Parol evidence to prove promise made at time of executing a release, 180.
- Position of parties as principal and surety shown by parol, 58.
- Proof that a claimed oral transfer was in writing, 61.
- Competency of witness, in replevin, 215.
- Competency of one partner after discharge in bankruptcy, 74.
- Competency of witness where having an interest in controversy, 246.
- Deposition of witness who subsequently became incompetent, 135.
- Variance between indictment and proof, 59.
- Book account as evidence—explanation of alteration, 478.
- In an action against an indorser the note is competent evidence to support any of the common money counts in assumpsit, 526.
- A creditor having debtor's claim for collection and is to apply proceeds upon the debt is a competent witness for plaintiff, 526.
- Statute authorizing joint action against all makers and indorsers of a note does not change the rules of evidence as to the testimony of co-defendants, 517.

Execution—

- Exemption of workhouse, 404.
- Stay of—bail for, 57.
- Discharge of bail for stay, 133.
- Exemption of a field of corn, 130.
- Goods seized by sheriff cannot be seized by another officer, 200.
- Explosion of boiler, liability for, 126.

Fences—

- Covenant as to in a lease, 364.
- Designed to keep stock at home, and not to guard against intrusion from those of other persons, 484.

Fleeing to Wall—

- English doctrine of is not law in this country, 1.

Forcible Detainer—

- Right to maintain action of, 211.

Forgery—

- Peddler's license not subject of, 31.
- Bills of credit not subject of with Ohio statutes, 153.

Fraudulent Conveyance—

- Haste in disposign of property to pay debts, to prevent levy by other creditors, does not make disposition fraudulent, 454.
- Fugitives from labor, 105, 160.

Gifts—

- Of note to take effect at donor's death, 366.
- Gifts *causa mortis*, 98.

Grave Robbing—

- Prosecution bound to prove an unnecessary allegation, as laid, 283.

Growing crops are personalty, 216.

- Do not pass to purchaser at judicial sale, 225.

Guaranty, of ultimate payment, 87.**Guardian and Ward—**

- Power of court of common pleas to require bond of—second bond where first has become insufficient—will cover money previously received by guardian and money on hand at its execution—what constitutes a breach of bond—separate bond for each ward, 486.

Habeas Corpus, 22.**Husband and Wife—**

- Wife's choses in action reached for husband's debts, 223.

Indictment—

- Averment of date of commitment of murder, 135.
- Indictment lost or stolen before sentence, 90.
- Defective for duplicity for charging riot and assault and battery, 572.
- Issue taken upon indorsement upon indictment that it was found upon testimony of witnesses, sworn and sent to the jury by order of the court, puts burden on the state, and must be by proof of *aliunde*, 572.

Infancy—

- Plea of infancy is no bar to the recovery of damages for his torts—nor a bar when payment is received by him after becoming of age, 503.
- Infant is liable for his torts, 16.
- Right to custody of infants, 238.

Injunction—

- To prevent sale of property pending litigation—must be identity of parties, 454.
- Court must be satisfied of fraudulent intention, 454.

- Not proper to enforce contract for personal service, 226.
- Court of chancery may interfere by injunction to prevent officers from acting illegally, 457.
- Dissolution of by judge in vacation—
Supreme judge may dissolve injunction in case pending in district court, 546.
- Court of equity will restrain those who seek by indirect means to attain an end previously forbidden, 559.
- Dissolution of by judge of district court in vacation, 565.
- May be granted in suit at law restraining defendant from disposing of property, 254.
- When allowed against a trespass, 316, 342.
- Innkeepers, liability of, 315.
- Insanity, 428, 416.
As an excuse for crime, 416.
- Insolvency—
Discharge of contract by court of another state, 363.
Suit by assignee of a bankrupt, 97.
- Insurance—
When policy attaches, 374.
Keeping gunpowder for sale in a country store, 379.
Conditions precedent to an assessment by a mutual company must be regarded or assessment is void, 577.
Construction of charter of Ohio Mutual Insurance Company, 577.
- Interest—
Note to bear interest from date if not paid when due is a good contract, 389.
- Intoxication—
As an excuse for crime, 38.
- Judgment—
Error to take default at the return term of a writ of *scire facias*, 262.
Supreme court has no jurisdiction to render judgment by confession, 315
Jurisdiction of to enter judgment upon cognovit, 344.
Effect of partition on lien of, 455.
Vacation of, where satisfaction of was entered by mistake, 405.
Cost of exchange on a bill cannot be included in amount taken on a warrant to confess, 405.
Arrest of, only for errors apparent on face of record, 444.
Validity in other states, 233.
Against a steamboat, 173.
- Lien of, where execution not issued within one year, 219.
Preference of pre-existing equity over, 58.
Lien of binds lands previously fraudulently alienated, 219.
- Jurisdiction—
In ejectment—question of raised at previous term, 55.
Jurisdiction of Ohio courts for crimes committed on Ohio river, 82.
- Juries—
Drawing of—challenge to array, 390.
Making no objection to incompetency of a juror is waiver of right to challenge for cause, 352.
Separation of before verdict—cannot be recalled, 444.
Peremptory challenge of juror by state, 135.
- Landlord and Tenant—
Nonpayment of rent, 65.
- Larceny—
Constructive taking of the property, 279.
- Lease—
Covenant for quiet enjoyment—damages the consideration, money and interest, 283.
Parol surrender of, 57.
Who are bound to make out and tender, 380.
Covenant to keep fences in repair, 364.
- Legacies—
Ademption of legacies by payment of claim during life of testator—By advancements—Evidence of intention of testator in payment, 507.
- Libel, 143.
- Limitation of Actions—
Plea of statute of limitations not favored, 56.
Where from case stated in bill the case appears to be barred, demurrer will lie, 414.
Notes made in a foreign state, 363.
On justice's bond, 369.
Statute of limitations not a plea to the merits, 198.
Against sheriff for malfeasance in office, 214.
On mutual accounts, 555.
Payment to prevent running of—Acknowledgment—Administrator or executor has no authority to revive a debt already barred, by a new promise, 555.

Limitation of Actions—Concluded.

No personal representative can, by any promise of his, enable a creditor whose claim is barred, to recover against an estate, 555.

Legality and morality of a plea of statute of limitations considered, 589.

Mail Carrier—

Liability for lost letters, 24.

Mandamus—

Service of alternative writ, 51.

Will lie to compel the auditor to pay a sum allowed by common pleas to attorney for assisting in prosecution of a state case—Remedy when allowance is made by mistake, 506.

To compel placing a bill of exceptions upon file—Insufficient answer that it was signed in blank, under agreement that counsel were to amend, 551.

Marriage—

Solemnization of marriage by a negro, 20.

Proof of by reputation, 368.

Of a person having former husband or wife living is void *ab initio*, 171.

Married Woman—

Deed for separate property if taken to her husband, 56.

When may contract as a *feme sole*, 186.

Master and Servant—

Liability of master for acts of his servant or agent, 335.

Action by one servant against another, *Ib.*

Mechanic's Lien, against equitable interest, 404.**Misnomer—**

Action or judgment against defendant by a wrong name, 66.

Mortgage—

Covenant will lie on ordinary condition of defeasance, 56.

On a steamboat is subject to claims against the boat, 405.

Of chattel, real must be recorded, 392.

Right of vendee of an estate to set up, after payment, a mortgage he has paid, as against another incumbrancer, 359.

Mortgagee who has assigned his interest not a necessary party to a foreclosure, 367.

Payable in installments, 380.

To secure payment of a debt and subsequent advances, 85.

To indemnify against contingent liability, 119.

Lien of first recorded mortgage, 119.

Purchase by mortgagee of the property at sheriff's sale, 59.

Infant heir of mortgagor not made a party to foreclosure, 135.

A release of the mortgage debt executed by five of six comortgagers held to be a discharge, 480.

Municipal Corporation—

Change of grade of streets, 440.

Liability of for injuries by acts of agents, 440.

Action in favor of a person injured against the city of Cincinnati for failure to repair streets, 462.

Liability of municipal corporations for injuries to persons caused by neglect or omission in performing a corporate duty, *Ib.*

Murder—

When assailed party is not required to retreat, 1.

Instructions to jury as to intention to kill—and degrees of the crime—Manslaughter—Effect of intoxication, 38

Conviction of manslaughter on indictment for murder, 1.

Upon indictment for in second degree jury may find manslaughter, 453.

Self defense, 353, 38.

Indictment for, by obstructing railroad tracks, 407.

By poisoning, 428.

Malice presumed when deadly poison is used, 416.

Navigation, Dangers of, 403.**New Trial—**

Equal division of court in opinion in capital cases, 32.

Misconduct of juror, 37; by drinking, 57.

Misdirection of court to jury, 364.

Nonsuit, 59.**Occupying Claimant, 5.**

When party in ejectment is entitled to benefit of law as to, 57, 192.

Conveyance of land subject to all sales and taxes does not entitle grantee to benefit of occupying claimant law, 252.

Where purchaser before taking possession is informed of a prior unrecorded deed, not entitled to benefit of such law, *Ib.*

Both title and possession must be obtained without fraud, *Ib.*

Officers—

Promise to indemnify is void as against public policy, 248.

Qualification of before a certain day, 102.

Pardon—

Effect of to restore civil rights of culprit, 235.

Parties—

Suit by guardian of lunatic, 69.

One party suing in behalf of many, 337.

Partition—

Partition of a reversion—Notice—Defective commissioner's report cured by confirmation—Evidence to prove commissioners sworn, 497.

Partnership—

Suing in partnership name, 381.

Dealings with after dissolution, 67, 74.

Payment—

Worthless notes or checks is not a payment, 8.

Money paid under belief that it has been previously paid may be recovered back, 261.

Declarations of the party are admissible in his own favor, to show that he believes the note is not paid, 76.

Payment to a bank in its own notes, 63.

Perjury—

To swear that peddler's license was forged is not, 31.

Pleading—

Cannot plead special matter and give notice of it with the general issue, 316.

What must appear to maintain suit in equity, 150.

When consideration should be averred, 382.

Defendant confined to such defenses as court deems essential of justice of his cause, 198.

Special pleas not allowed, 198.

Null tul record, 133.

Poisoning, 428.**Præcipe—**

Præcipe for mesne process, amount allowed due should be indorsed on, 166.

Amendment of, 166.

Railroads—

Rights of stockholders to enforce conditions of subscription, 559.

Obstructing tracks, 407.

One citizen may sue in chancery in behalf of himself and others to avoid an illegal tax for railroad subscription, 457.

Subscription made by vote of people may be changed from one railroad to another, by legislative act, 76.

Not liable for running over animals straying upon track at other places than regular crossing, although engineer might have stopped engine and allowed them to get out of danger, 484.

Deviations from routes—Lateral roads—Power of directors to change location of road. Acceptance of amendments to charter, 532.

Directors cannot change location, 546.

Making surveys, or passing resolutions, do not amount to location, 546.

Conversion of bonds into stock in corporation, 546.

Power to locate is exhausted by an actual location—Amended charter authorizing relocation, 550.

Stockholders have no right to deny the power conferred by such amendment—Effect of subscriptions to stock on condition of locating, 559.

Retroactive Law, 55.

Roads—Obstructing—Establishment of, 76.

Sale—

Proof of false warranty in reduction of damages, 413.

Scire Facias—

Writ of supersedeas the necessity of declaration, 56.

Must be fifteen days between service and return of, 57.

Self Defense, 38.

Self defense as a defense for stabbing, 17.

Settlement—

Compromise by parties after assignment of judgment, pending appeal, without knowledge of the assignee, upheld, 58.

Slander, amendment of declaration, 191.

Slavery, statute against kidnapping, 197.

Spirituuous Liquors—

If something else is nominally sold and the liquor given in, so that it is clear that the seller got pay for the liquor under another name, an offense is committed, 527.

Statutes—

Should be construed so as to lead to just results, unless the language compels a different construction, 577.

In construing statutes, the general intent of the legislature, apparent from the object and scope of the act, should prevail, unless the wording precludes such a construction, 594.

Statute of Frauds—Part performance, 10.

Growing crops not within, 216.

Subpœna—

No subpœna required upon a cross bill, where party filing it had an interest or right to, but it is otherwise where a lien or interest is acquired by filing of the bill, 485.

Sureties—

Discharge of by giving time to principal, 59.

Relation of principal and surety may arise after making a contract, 584.

One partner, after dissolution, treated as surety for the other as to partnership debt, 584.

Such partner may file a bill in chancery against his copartner, to compel such copartner to pay the judgment, and persons indebted to him may be joined in the bill, 584.

Taxation—

Title derived by sale of forfeited lands, 265.

Telegraph Company—

Liability of telegraph companies for mistakes in messages, 574.

Tenants in common—

Exclusion of one by the other—Collection of rents, 141.

Tender and Payment—Place of, 128.**Turnpikes—Preference of state as to tolls, 136.**

Powers of companies—Receiver for, 26.

Usury—

Interest in advance by banks, 49.

Interest based on 360 days for a year is not, 49.

Warranty—Proof of in reduction of damages, 413.

Implied as to kind, 81.

Watercraft—

To recover on note given "for money

borrowed for use of the boat," proof must be made that the money was for some item expressed in the statute, 263.

Use of precautions to avoid a collision, 5.

Jurisdiction over boat, 11.

Recovery for injuries in a collision, 50.

Ferryboat is a steamboat, within the meaning of law.

Claim for cause of action arising in another state, 452.

Law as to is remedial in its character and not to be question in foreign courts, 452.

Notice, how served, 452.

Place of seizure and not locality of ownership confers jurisdiction, 452.

Admiralty and maritime jurisdiction, 453.

Liability for freight charges, 228.

Rights of persons injured in a collision—Stay of execution, 168.

Action for indebtedness created in another state, 207.

Joint liability of owners of two boats by which a person was injured in a collision between, 230.

Action cannot be sustained against craft on note given for service of master, 473.

Cause of action which will sustain a suit under watercraft law is not transferable, even if evidenced by a negotiable note, 474.

Watercraft law does not authorize proceedings against a boat for services rendered by an agent on land, although the services were connected with the business of the craft, 477.

Weapons—Carrying, 353.**Witness—**

Recognizance of, 96.

